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TABLE OF CONTENTS

OF SPEECHES AND SERMONS: WORSHIP IN LIMITED PURPOSE PUBLIC FORUMS ..... *Richard Esenberg* 453

ROOTING FOR THE RESTYLED RULES (EVEN THOUGH I OPPOSED THEM) ..... *Jeremy Counseller* 519

REPUDIATING *EVERSON*: ON BUSES, BOOKS, AND TEACHING ARTICLES OF FAITH ..... *Mark Strasser* 567

WHY EVERY STATE SHOULD HAVE AN INCOME TAX (AND A RETAIL SALES TAX, TOO) ..... *Herwig Schlunk* 637

OF SPEECHES AND SERMONS: WORSHIP IN LIMITED PURPOSE PUBLIC FORUMS

*Richard Esenberg**

". . . we worship what we know . . . ." - John 4:22

I. INTRODUCTION 454
II. PRIVATE RELIGIOUS SPEECH IN PUBLIC SPACES 457
A. *Government Forum Analysis* 457
B. *Community Use Policies* 458
C. *Limits on the Exclusion of Religious Speech* 460
1. Widmar v. Vincent 460
2. The Lamb's Chapel Trilogy 462
a. *Lamb's Chapel* 462
b. *Rosenberger* 464
c. *Good News Club* 469
III. WORSHIP IN PUBLIC SPACES 473
A. *Lower Court Cases* 473
1. Faith Center 473
2. Bronx Household of Faith 480
3. DeBoer 483
4. Citizens for Community Values and Roman Catholic Foundation 487

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B. *The Significance of Worship in Public Places* 489
1. Can the Question Be Avoided? 489
2. Is the Question "Resolved?" 491
IV. WORSHIP AS SPEECH WITHIN THE PURPOSES 493
A. *Does Worship Communicate?* 493
1. Talk About God 494
2. Talk About the World 496
B. *Worship and the World* 499
V. IS WORSHIP ITS OWN CATEGORY OF COMMUNICATION? 505
A. *Is There Something About Worship?* 505
B. *The Preservations of Social Peace and Nonestablishment* 508
1. Avoiding Divisive Uses 508
2. Avoiding Establishment (Or Its Appearance) 510
VI. CONCLUSION 515

I. INTRODUCTION

Concurring in the result in *Faith Center Church Evangelistic Ministries v. Glover*, Judge Lawrence Karlton regrets that the United States Supreme Court cannot tell the difference between a speech and a sermon.[1]

Sermons, he believes, ought not—or at least need not—be permitted on public property or in government sponsored forums.[2] If, he writes, a majority of Justices really cannot tell the difference between prayer and a political address, they ought to get out more and consult the putative wisdom of the man or woman on the street.[3]

In *Glover*, a divided panel of the United States Court of Appeals for the Ninth Circuit held that a California county that

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[1] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1215 (9th Cir. 2006) (Karlton, J. concurring), *vacated*, 480 F.3d 891 (9th Cir. 2007), *cert. denied* 128 S. Ct. 143 (2007).

[2] *Id.* at 1215-16.

[3] *Id.* at 1216.

had opened up its libraries' meeting rooms for use by the public for "'educational, cultural and community-related'" meetings may refuse to permit these rooms to be used for worship.[4] It was the burden of the majority to distinguish Supreme Court precedents holding that religious speech cannot be excluded from such "limited purpose" public forums if that speech is otherwise within the forum's purpose.[5]

One member of the majority, Judge Richard Paez, attempted to construct an argument that worship differs from speech on secular matters from a religious perspective in a way that is constitutionally significant.[6] Judge Karlton regretted that the exercise was necessary.[7] It reflected, in his view, "the sorry state of the law" governing religious speakers in a public place.[8]

Judge Karlton has friends in high places. Dissenting in *Good News Club v. Milford Central School*, Justice David Souter lamented the unwillingness of the majority to permit a school to deny a community group use of its facility for what he characterized as "an evangelical service of worship."[9] Justice John Paul Stevens, in a separate dissent, argued that governmental bodies who have opened their facilities to community speech may nevertheless exclude those who wish to worship or to proselytize or to inculcate belief in a particular faith.[10] For both Justices (and for, at least, Justice Ginsburg who joined Stevens' dissent), government, while it may have the obligation to permit some types of religious perspectives on secular subjects for which it has created a forum, need not—and perhaps even may not—permit religious speech that is, in some way, "too religious," e.g., is proselytizing or contains too much prayer or confessional content.[11] Justice Stephen Breyer took

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[4] *Id.* at 1198, 1214 (majority opinion).

[5] *Id.* at 1202-03.

[6] *Id.* at 1215 (Karlton, J., concurring).

[7] *Id.*

[8] *Id.*

[9] 533 U.S. 98, 138-39 (2001) (Souter, J., dissenting).

[10] *Id.* at 133-34 (Stevens, J., dissenting).

[11] *Id.*; *see also id.* at 139 (Souter, J. dissenting).

the view that the exclusion of such communication might be justified on Establishment Clause grounds.[12]

But not enough friends. Although Judge Karlton would apparently regard even speech on secular topics from a religious perspective as impermissible "sermon[s]," the rule, as Judge Paez recognized, is that "even . . . 'quintessentially religious'" speech may not be excluded from a limited purpose public forum simply because it is religious.[13] But we can borrow Judge Karlton's phrase to suggest a different line of demarcation. The question in *Glover*—and the issue here—is whether there is a judicially cognizable category of religious speech called "worship" which may be constitutionally excluded from public forums. If the State must permit religious speeches, must it suffer prayer and sermons in public forums?

I argue that the distinction cannot readily be made, at least not without adopting a characterization of worship that is at odds with what many worshippers think they are doing. Moreover, if the Court is to maintain neutrality between religion and irreligion with respect to those speakers for whom it provides a forum, the distinction of worship from other forms of communication, even if it can be made, undermines that neutrality.

In this article, I review the current law governing forums for speech provided by the government and the treatment of religious speech within limited purpose public forums. I go on to consider application of that law to religious speech that can be categorized as worship and pose the question of the circumstances under which worship may be excluded from limited public forums. I briefly review selected paradigms of Christian worship suggesting that worship constitutes communication among participants. This communication, moreover, is likely to concern temporal as well as spiritual matters; and, therefore, can be expected to fall within the purpose of broadly defined limited purpose public forums. I then consider whether worship, while conveying information within

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[12] *Id.* at 127-30 (Breyer, J., concurring in part).

[13] *Glover*, 462 F.3d at 1209 (majority opinino), 1215 (Karlton, J., concurring).

the purpose of many such forums, might nevertheless fall within a separate category of speech, either because of its special attributes, supposed divisiveness or to avoid an Establishment Clause violation. I maintain that it cannot. Finally, I conclude that permitting worship within limited purpose public forums is consistent with both a desire to maintain neutrality between religion and irreligion and to help facilitate the development of private spheres of meaning.

II. PRIVATE RELIGIOUS SPEECH IN PUBLIC SPACES

First, a matter of definition. We are not concerned here with speech by the government itself or even private speech that is directed at a captive audience, such as students in a classroom, assembly, or graduation ceremony. Our focus here is on circumstances in which the government provides a forum for speech to members of the community by, for example, allowing outside groups to use a school building during non-school hours or permitting the community to reserve and use a meeting space in a public building.

A. Government Forum Analysis

As a general matter, no one has the right to speak on government property.[14] But some public spaces such as streets, parks, and civic plazas that, by tradition and custom, have been devoted to public assembly and debate have come to be regarded as traditional public forums.[15] In such places, a speaker—even a religious one and even one in prayer or worship—may be excluded only if "necessary to serve a compelling state interest" and that exclusion must be "narrowly drawn to achieve that end."[16]

Even public places not traditionally recognized for public assembly and debate may become so by government policy.[17] Restrictions on these designated public forums are also subject

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[14] Greer v. Spock, 424 U.S. 828, 836-37 (1976).

[15] *Id.* at 835-36.

[16] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[17] *Id.*

to strict scrutiny.[18] An example might be a community broadcast facility made open to all comers for any purpose.

But the government need not open a place or channel of communication to everyone for every thing. A limited purpose public forum is created when government designates a forum for use by certain speakers or for the discussion of certain subjects.[19] In these circumstances, an entire class of speakers or entire subjects may be excluded through the application of reasonable restrictions on the *content* of the speech allowed.[20] But, crucially, those restrictions must be *viewpoint neutral*.[21] The distinction between what comprises content and what constitutes a viewpoint sounds troublesome, and it is. Courts have struggled with the distinction and we will here as well.

Finally, nonpublic forums that are not open to the public may impose content-based restrictions as long as these restrictions do not "suppress expression merely because public officials oppose the speaker's view."[22]

B. Community Use Policies

Here, we are concerned with limited purpose public forums. Government creates these forums in a variety of ways. School districts often allow their buildings to be used by community groups both after school and during the weekend.[23] Libraries and other municipal buildings are also frequently available for public use.[24] At times, the use is restricted to matters that touch

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[18] *Id.* at 45-46.

[19] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

[20] *Id.*

[21] *Id.*

[22] *Perry Educ. Ass'n*, 460 U.S. at 46.

[23] Sometimes state law authorizes such use. *See, e.g.*, N.Y. EDUC. LAW § 414 (2008).

[24] The Milwaukee Public Library's meeting rooms are "open to organizations engaged in educational, cultural, intellectual or charitable activities." Milwaukee Public Library, Policy and Guidelines for Meeting Room Use, *available at* http://www.mpl.org/file/meetingroom_policy.htm (last visited Jan. 27, 2009). Preference is given to city residents and uses associated with the library. *Id.* No commercial uses are permitted but there is no exclusion of religious activities or worship. *Id.* The Los Angeles public library makes its facilities broadly available "for public use." Los Angeles Public Library, Policies for the Use of Library Facilities and Meeting Rooms, *available at*

upon the mission of the school, i.e., it must be some kind of programming for children with a broadly defined educational purpose.[25]

In other instances, the permitted purposes are even less narrowly defined, with access policies focusing more on *who may use a facility rather than the purpose* for which it is to be used.[26] Thus, a governmental body may make its facilities generally available to a variety of community groups.[27]

The key, for our purposes, is that the reason public facilities are made available to outsiders likely consists of some combination of a general desire to serve the community and a specific desire to build support for the government within the community. These reasons will generally point to broader access and, indeed, most governments with community use policies define them expansively.

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http://www.lapl.org/facilities/policies.html (last visited Jan. 27, 2009).

[25] The Mequon-Thiensville School District (Wis.) provides for broad use to support the "educational, recreation and social development of the community" and confers a priority on uses more closely identified with the school district's educational mission. Mequon-Thiensville School District, Use of District Facilities, *available at* http://www.neola.com/mequon-wi/search/policies/po7510.htm (last visited Jan. 27, 2009). The Seattle Public Schools have a similar policy. Seattle Public Schools, Community Use of School District Facilities 2-3 (last visited Jan. 27, 2009).

[26] For example, Milwaukee's public school facilities are generally available for after-hours use without apparent restriction, see, e.g., Administrative Procedure 502(3), although there are requirements for public and, where pertinent, candidate access, as well as, for political meetings, a pre-election "blackout" period for "speaker, panel, round table, debate, or discussion programs of the forum type on economic, social and political subjects . . . ." Milwaukee Public Schools, Administrative Procedures 5.02: Use of School Facilities 3-4, *available at* http://www2.milwaukee.k12.wi.us/governance/rulespol/procs/PDF/CH05/5_02.pdf (last visited Jan. 27, 2009).

[27] A limited public forum may be nonphysical as well. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833-34 (1995). *See also* Husain v. Springer, 494 F.3d 108, 121 (2d Cir. 2007) (student activity fund at public university); Child Evangelism Fellowship v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1069 (4th Cir. 2006) (discretionary waiver of fees by school district); Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004) (state "Choose Life" license plates); Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany, 399 F. Supp. 2d 136, 147 (N.D.N.Y. 2005) (student activity fund at public university); Gay Lesbian Bisexual Alliance v. Sessions, 917 F. Supp. 1558, 1560 (M.D. Ala. 1996) (access to public university funds); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 801 (1985) (Combined Federal Campaign).

But municipal bodies have, nevertheless, attempted to curtail religious uses. Either out of the fear of litigation or the belief that such uses would be divisive or violate legal principles calling for the separation of church and state, government has frequently created religious-use exceptions to policies permitting otherwise broad access to public facilities.[28]

C. Limits on the Exclusion of Religious Speech

1. Widmar v. Vincent

These restrictions have not fared well before the Supreme Court. In *Widmar v. Vincent*,[29] the Court considered the University of Missouri at Kansas City's policy of excluding religious groups from its open forum policy, which made university facilities generally available for registered student groups.[30] Although not phrased in terms of public forum analysis, the Court held that an exclusion of speech based upon its content must be justified by a compelling state interest.[31] Although avoiding a violation of the Establishment Clause could be such an interest, an "equal access" policy would risk no such

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[28] For example, the Hamilton County public library in Cincinnati, Ohio, permits the use of its meeting rooms for "educational, cultural, civic, social, political [and] religious . . . organizations". . . but not for "conducting religious services." Cincinnati Library Home Page, *available at* http://www.cincinnatilibrary.org/policies/meetingroompolicy.pdf (last visited Jan. 27, 2009). The Dayton, Ohio public library meeting rooms may not be used for "religious services, or events promoting the doctrine of one church or religious faith." Dayton Metro Library Home Page, *available at* http://www.dayton.lib.oh.us/MeetingRm.cfm (last visited Jan. 27, 2009). The Upper Arlington public library in Columbus, Ohio, permits use of its meeting rooms by committees of a church "provided no religious services are involved." Upper Arlington Public Library Home Page, *available at* http://www.ualibrary.org/pr/meetingroom.pdf (last visited Jan. 27, 2009). The library meeting rooms may not be used for "religious or political campaign meetings . . . ." *Id.* The New York public library rents its facilities to all comers subject to certain restrictions including the exclusion of "political or religious functions . . . ." Special Events Guidelines and Restrictions for the Use of the New York Public Library, Humanities and Social Sciences Library Building, http://www.nypl.org/spacerental/pdf/guidelines.pdf (last visited Nov. 8, 2008).

[29] 454 U.S. 263, 264 (1981).

[30] *Id.*

[31] *Id.* at 270.

violation.[32]

Writing for the Court, Justice Powell rejected the notion that religious worship is not speech generally protected by the First Amendment.[33] Rejecting the idea that there is a distinction between some types of religious speech and "a new class of religious 'speech acts' . . . constituting 'worship,'" he wrote:

> First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," post, at 281, cease to be "singing, teaching, and reading"–all apparently forms of "speech," despite their religious subject matter–and become unprotected "worship."
>
> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler v. Rhode Island*, 345 U.S. 67, 70, (1953). Merely to draw the distinction would require the university–and ultimately the courts–to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. *E.g., Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).[34]

Justice Powell also questioned the relevance of the distinction. He saw no constitutional distinction between "religious speech designed to win religious converts . . . [and] religious worship by persons already converted."[35]

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[32] *Id.* at 271.

[33] *Id.* at 269.

[34] *Id.* at 269-70 n.6.

[35] *Id.* at 270 n.6.

2. The Lamb's Chapel Trilogy

a. Lamb's Chapel

In *Lamb's Chapel v. Center Moriches School District*,[36] a school district, acting pursuant to state law, adopted a policy authorizing off-hours use of school property for, among other things, "social, civic and recreational meetings."[37] The policy further specified[38] that they were not available for religious purposes.[39] Lamb's Chapel, an evangelical Christian church, sought permission to use the school building to show a six-part series on childrearing from a Christian perspective.[40]

The school district denied its request and Lamb's Chapel brought suit, alleging that the denial constituted "a violation of the Freedom of Speech and Assembly Clauses, and the Establishment Clause of the First Amendment."[41] The district court granted summary judgment for the school district, and the Court of Appeals for the Second Circuit affirmed.[42]

The Supreme Court unanimously reversed.[43] Noting the wide variety of uses that had been permitted in the past[44] and that discussions on childrearing were otherwise permissible uses, the Court held that such a discussion could not be excluded

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[36] 508 U.S. 384, 386 (1993).

[37] *Id.* at 387.

[38] New York Education Law Section 414 had authorized (and still does authorize) school districts in that state to adopt reasonable regulations for permitting the public to engage in off-hour use of school facilities for a variety of purposes including: "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community . . . ." N.Y. EDUC. LAW § 414(1)(c) (2008). Such uses "shall be non-exclusive and shall be open to the general public." *Id.*

[39] *Lamb's Chapel*, 508 U.S. at 387. This restriction was apparently required by state law, which did not list "religious purposes" as a permitted use and had been interpreted to exclude such use. Trictley v. Bd. of Educ. of Buffalo, 409 N.Y.S.2d 912, 915 (1978) ("[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414").

[40] *Lamb's Chapel*, 508 U.S. at 389 n.3.

[41] *Id.* at 389.

[42] *Id.* at 390.

[43] *Id.* at 392.

[44] *Id.* at 391. Among those uses was a "New Age religious group known as the 'Mind Center.'" *Id.* at n.5.

simply because it was approached from a religious perspective.[45] To do so would constitute viewpoint discrimination and be impermissible for a limited public forum.[46] Writing for the Court, Justice White observed:

> There is no suggestion from the courts below or from the District or the State that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. That subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius*. . . .[47]

The majority applied the three-part test set forth in *Lemon v. Kurtzman*[48] and held that the school district's broad open access policy 1) had a secular purpose, 2) did not have the principal or primary effect of advancing or inhibiting religion, and 3) did not foster an excessive entanglement with religion.[49] Implicit in this reasoning is the notion that the absence of a secular purpose or a primary or principal effect that did advance religion, even in general, would raise constitutional concerns.

But also implicit is the notion that evenhanded treatment of religion does not "advance" it and that government, at least

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[45] *Id.* at 393.

[46] *Id.*

[47] *Id.* at 393-94.

[48] 403 U.S. 602 (1971).

[49] *Lamb's Chapel*, 508 U.S. at 395. Justices Kennedy and Scalia (joined by Justice Thomas) wrote separately to express their disapproval of the Court's continued adherence to the *Lemon* three-part test. *Id.* at 397 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 398 (Scalia, J., concurring in the judgment). "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." *Id.* at 398. Justices Scalia and Thomas also disagreed with the majority's view that *Lamb's Chapel's* proposed use is constitutional because it would not signal an endorsement of religion in general, arguing that such an endorsement is not prohibited by the Establishment Clause. *Id.* at 400-01.

when it comes to limited purpose public forum, must be neutral not only among religions but between religion and irreligion.[50]

Notably, the Court rejected the school district's contention that the exclusion of religious uses could be justified by a desire to avoid an Establishment Clause violation or because religious use would be divisive.[51] In doing so, it addressed language in *Widmar* suggesting that the State may have a compelling interest in avoiding an Establishment Clause violation.[52] Although acknowledging that this interest may, in proper circumstances, justify the regulation or abridgment of otherwise protected speech, Justice White rather easily disposed of the Establishment Clause rationale for excluding Lamb's Chapel:

> We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.[53]

b. Rosenberger

In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court held that the University of Virginia could not deny use of university printing services to a religious group seeking to publish a Christian magazine.[54] University policy provided for the payment of certain outside bills incurred by

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[50] *See also* McCreary County v. ACLU, 545 U.S. 844, 860 (2005); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963).

[51] *Lambs Chapel*, 508 U.S. at 395-96.

[52] *Id.* at 394-95.

[53] *Id.* at 395.

[54] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 837 (1995).

officially recognized student organizations known as "Contracted Independent Organizations" (CIOs).[55] That policy, however, precluded payment for expenses incurred in certain activities, including "religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses."[56] A religious activity, for purposes of this exclusion, was defined as any activity that "'primarily promotes or manifests a particular belie[f] in or about a deity or ultimate reality.'"[57]

Wide Awake Productions, founded by Ronald Rosenberger and others, was a qualified CIO formed to publish a "magazine of philosophical and religious expression" from a Christian perspective.[58] Issues of *Wide Awake* included articles about "racism, crisis pregnancy, stress, prayer, [and] C.S. Lewis' ideas about evil and free will."[59] The University refused to pay printing bills that it would have paid for secular publications on the ground that publication of the newspaper amounted to a "religious activity" and, under the University's definition, there is little doubt that it did.[60]

The district court granted summary judgment for the University, and the Fourth Circuit affirmed.[61] The Supreme Court reversed, although this time by a 5-4 vote.[62] The majority found that the refusal to pay Wide Awake's printing bills

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[55] *Id.* at 823.

[56] *Id.* at 825.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 826.

[60] *Id.* at 827. The masthead of Wide Awake bore St. Paul's exhortation that "'the hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed. Romans 13:11.'" *Id.* at 865 (Souter, J., dissenting). Articles included statements such as "'[g]o into all the world and preach the good news to all creation' (Mark 16:15)" and "[t]he great Commission is the prime-directive for our lives as Christians. . . ." *Id.* at 866.

[61] *Id.* at 828 (majority opinion).

[62] *Id.* at 822.

constituted viewpoint discrimination.[63] Writing for the Court, Justice Kennedy acknowledged that the funding of CIOs was "a forum more in [the] metaphysical than . . . spatial or geographic sense," but that the Court's public forum analysis was nevertheless applicable.[64] While recognizing that the government may make viewpoint distinctions when it is the speaker, e.g., when it "appropriates public funds to promote a particular policy of its own" or "disburses public funds to private entities to convey a governmental message," viewpoint restrictions are not proper when it "expends funds to encourage a diversity of views from private speakers."[65]

As in *Lamb's Chapel*, the *Rosenberger* Court held that the exclusion of religious perspectives from a generally available forum constitutes viewpoint discrimination.[66] The Court rejected the notion that religious viewpoints constituted a separate category of content, finding that Wide Awake's religiously themed communication was:

> [A] specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.[67]

Once again, the Court found that the exclusion of religious perspectives could not be justified by the desire to avoid an Establishment Clause violation,[68] and rejected the idea that the exclusion of all religious viewpoints passed constitutional muster.[69]

The University had argued, and the Court of Appeals agreed that:

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[63] *Id.* at 831.
[64] *Id.* at 830.
[65] *Id.* at 833-34.
[66] *Id.* at 837.
[67] *Id.* at 831.
[68] *Id.* at 845-46.
[69] *Id.* at 831.

> [B]ecause Wide Awake is "a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy," the University's provision of SAF funds for its publication would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values."[70]

Without mentioning *Lemon*, the Supreme Court responded by emphasizing the neutrality of the University's funding programs toward the private speech that it chooses to underwrite.[71]

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. We have decided a series of cases addressing the receipt of government benefits where religion or religious views are implicated in some degree. The first case in our modern Establishment Clause jurisprudence was *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we must "be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.* at 16, 67 S.Ct. at 512. We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.[72]

The Court noted, in particular, the difficulty that would accompany a rule that required, or for that matter, permitted, the University "to scrutinize the content of student speech, lest the expression in question–speech otherwise protected by the Constitution–contain too great a religious content."[73]

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[70] *Id.* at 838.

[71] *Id.*

[72] *Id.* at 839.

[73] *Id.* at 844.

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented. In their view, even the magazine's essays on apparently secular topics became "platforms from which to call readers to fulfill the tenets of Christianity in their lives."[74] The publication was not, he wrote, "merely descriptive examination of religious doctrine or even of ideal Christian practice."[75] It was not "merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation."[76] Rather, Justice Souter wrote, the magazine "is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ."[77] In the dissent's view, Wide Awake was:

> not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life. Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause.[78]

The fact that this took place in an evenhanded manner pursuant to a neutral program did not allay Justice Souter's concerns.[79] In his view, neutrality is only one salient Establishment Clause concern, and a prohibition against direct funding of religious activities is at the heart of the Establishment Clause.[80] Avoiding this would justify the exclusion of Wide Awake from University funding:

> This recognition reflects the Court's appreciation of two general rules: that whenever affirmative government aid ultimately benefits religion, the Establishment Clause requires

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[74] *Id.* at 866 (Souter, J., dissenting).
[75] *Id.* at 867.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 868.
[79] *Id.*
[80] *Id.*

> some justification beyond evenhandedness on the government's part; and that direct public funding of core sectarian activities, even if accomplished pursuant to an evenhanded program, would be entirely inconsistent with the Establishment Clause and would strike at the very heart of the Clause's protection.[81]

c. Good News Club

Finally, in *Good News Club v. Milford Central School*, the Milford Central School had permitted community use of its building for "instruction in any branch of education, learning or the arts" or for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."[82]

Two district residents sponsored an organization called Good News Club, a private Christian organization for children ages six to twelve.[83] The group proposed after-school meetings in which children would learn and memorize Bible verses, sing songs and play Bible-themed games, and listen to Bible stories and discuss how those stories related to their lives.[84] The school denied the Club's request because: "the kinds of activities proposed to be engaged in by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself."[85]

The Club sued; the district court granted summary judgment for the school district; and a divided panel of the Second Circuit Court of Appeals affirmed.[86] The majority held that the district's restriction against allowing religious instruction in its school is not unreasonable and that, because

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[81] *Id.* at 878.

[82] 533 U.S. 98, 102 (2001).

[83] *Id.* at 103.

[84] *Id.*

[85] *Id.* at 103-04.

[86] *Id.* at 104-05.

the Club's proposed use was "quintessentially religious" and fell "outside the bounds of pure 'moral and character development,'" the policy of exclusion was constitutional subject discrimination and not unconstitutional viewpoint discrimination.[87]

The Supreme Court reversed—once again by a 5-4 vote. Because Good News Club taught morals and character development, albeit from a non-secular perspective,[88] its proposed use fit within the purpose for which the building was made available and its exclusion constituted viewpoint discrimination.[89]

Writing for the Court, Justice Thomas was untroubled by the Court of Appeals' characterization of the Good News program as "quintessentially religious."[90] In fact, he conceded the essential accuracy of Justice Souter's description of *Good News* meetings as an "evangelical service of worship calling children to commit themselves in an act of Christian conversion."[91] Justice Thomas denied that something "quintessentially religious" or "'decidedly religious in nature'" cannot "also be characterized properly as the teaching of morals and character development from a particular viewpoint."[92] Notwithstanding the accuracy of Justice Souter's description, the majority refused to hold that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not."[93]

The fact that the program was open to elementary school children and would take place immediately after school was insufficient to distinguish it from *Lamb's Chapel*. The Court emphasized that even-handed treatment of religious uses would respect, rather than violate, the requisite neutrality toward

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[87] *Id.* at 105 (quoting Good News Club v. Milford Cent. Sch., 292 F.3d 502, 510-11 (2d Cir. 2000)).

[88] *Id.*

[89] *Id.* at 108-109.

[90] *Id.* at 105.

[91] *Id.* at 138 (Souter, J., dissenting).

[92] *Id.* at 111 (majority opinion).

[93] *Id.*

religion.[94] It was, the Court noted, parents who would decide whether their children would attend[95] and there was no evidence that children were permitted to loiter.[96] The Court rejected the notion that the mere presence of religious instruction in an elementary school where children may be present raises Establishment Clause concerns.[97] Justice Thomas wrote:

> [E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.[98]

Justice Scalia concurred, noting that the dissent's inability to agree on whether the potentially offending speech was excludable because it was "proselytizing" or because it was an "evangelical service of worship"[99] was probative of Justice Powell's observation in *Widmar* that attempting to distinguish between acceptable and unacceptable religious speech by private persons is both unmanageable and unrelated to anything of constitutional significance.[100] He conceded that the Court has drawn distinctions "between religious speech generally and speech about religion," but "only with regard to restrictions the State must place on its own speech, where pervasive state monitoring is unproblematic."[101]

Justice Stevens and Justice Souter (joined by Justice Ginsburg) dissented.[102] Justice Stevens divided religious speech into three categories: 1) speech about a particular topic from a religious point of view, 2) speech that amounts to worship or its

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[94] *Id.* at 114.

[95] *Id.* at 115.

[96] *Id.* at 118.

[97] *Id.* at 117-18.

[98] *Id.* at 118.

[99] *Id.* at 121 (Scalia, J., concurring).

[100] *Id.* at 127.

[101] *Id.* at 126 n.3.

[102] Justice Breyer concurred in part, but would have permitted the case to go to trial on Milford's Establishment Clause defense. *Id.* at 127-30 (Breyer, J., concurring).

equivalent, and 3) speech that is aimed principally at proselytizing or inculcating belief in a particular religious faith.[103] In his view, a school can, consistent with the First Amendment, create a limited public forum that admits the first type of religious speech without allowing the other two.[104] Acknowledging that the lines distinguishing these types of speech are difficult to draw, Justice Stevens nevertheless thought it was critical that a school, "particularly an elementary school," be permitted to draw them.[105]

For Justice Stevens, school officials could reasonably believe that evangelical meetings will be too divisive:

> Distinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization. If a school decides to authorize afterschool discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions. But must it therefore allow organized political groups—for example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan—to hold meetings, the principal purpose of which is not to discuss the current-events topic from their own unique point of view but rather to recruit others to join their respective groups? I think not. Such recruiting meetings may introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission. Cf. *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (upholding a city's refusal to allow "'political advertising'" on public transportation).[106]

Justice Souter, joined by Justice Ginsburg, emphasized, as had the Court of Appeals, the "quintessentially religious" nature

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[103] *Id.* at 130.

[104] *Id.*

[105] *Id.* at 133 (citing Illinois ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cty., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) ("In no activity of the State is it more vital to keep out divisive forces than in its schools . . .")).

[106] *Id.* at 131-32.

of the Club's meetings:

> In a sample lesson considered by the District Court, children are instructed that "[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him . . . . If you have received the Lord Jesus as your Saviour from sin, you belong to God's special group–His family." App. to Pet. for Cert. C17-C18 (ellipsis in original). The lesson plan instructs the teacher to "lead a child to Christ," and, when reading a Bible verse, to "[e]mphasize that this verse is from the Bible, God's Word," and is "important–and true–because God said it." The lesson further exhorts the teacher to "[b]e sure to give an opportunity for the 'unsaved' children in your class to respond to the Gospel" and cautions against "neglect[ing] this responsibility."[107]

He accused the majority of ignoring reality by characterizing the Club's activity in a "bland and general" way.[108] Unless, he concluded, the Court's decision was understood in "equally generic terms" it would stand for "the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque."[109]

III. WORSHIP IN PUBLIC SPACES

Notwithstanding Justice Souter's concern about the implications of *Good News*, municipal and other government bodies have attempted to restrict the access of religious groups to generally available facilities and forums if they propose to engage in something that is characterized as worship.

A. Lower Court Cases

1. Faith Center

The few lower court decisions to reach the matter have

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[107] *Id.* at 137.

[108] *Id.* at 138-39.

[109] *Id.* at 139.

differed. In *Faith Center Church Evangelical Ministries v. Glover*, noted at the beginning of this article, an evangelical church had sought permission to use a meeting room at the Antioch Library in Contra Costa County, California.[110] County policy made library meeting rooms available to groups for "educational, cultural and community related meetings, programs and activities."[111] Library policy initially prohibited use of the room for "religious purposes."[112] Applying this policy, it denied Faith Center's application for use of the meeting room, and the church filed suit.[113]

Although Faith Center's application had been denied under the old policy (which the county conceded was overly broad), the policy was subsequently revised to prohibit "religious services."[114] Under this revised policy, the county drew a distinction between a proposed morning "Wordshop" entitled "The Making of an Intercessor" in which attendees would be taught "how to pray fervent, effectual [p]rayers that God hears and answers, and an afternoon "Praise and Worship Service" with a sermon.[115] The former would be permitted, while the latter would not.[116]

The district court granted Faith Center's motion for a preliminary injunction, but a divided panel of the Ninth Circuit Court of Appeals reversed. Faith Center argued that religious worship was an "educational, cultural and community related" activity and thus within the purposes of the forum.[117] The majority concluded, without further explanation, that not everything community-related must be granted access.[118] A

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[110] 462 F.3d 1194, 1205 (9th Cir. 2006) (quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966)); *see also* Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194 (9th Cir. 2006) (Karlton, J. concurring), *vacated*, 480 F.3d 891 (9th Cir. 2007), *cert. denied* 128 S. Ct. 143 (2007).

[111] *Id.* at 1198.

[112] *Id.* at 1198-99.

[113] *Id.* at 1199.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 1200.

[117] *Id.* at 1198.

[118] *Id.* at 1211.

library, it concluded, "is quintessentially 'a place dedicated to quiet, to knowledge, and to beauty'"[119] and use of the meeting room "was not intended to undermine the library's primary function as a venue for reading, writing, and quiet contemplation."[120]

Judge Paez, writing for the majority, held that the county could reasonably exclude worship to avoid, borrowing from Justice Souter, the "remarkable proposition that any public [building] opened for civic meetings must be opened for use as a church, synagogue, or mosque."[121] The majority held that the county:

> [R]easonably could conclude that the controversy and distraction of religious worship within the Antioch Library meeting room may alienate patrons and undermine the library's purpose of making itself available to the whole community.[122]

Although one might conclude that excluding something because it may cause "controversy" and "distraction" sounds like viewpoint discrimination,[123] the majority regarded this exclusion as content-based. In so concluding, it maintained that the *Good News Club* Court's assertion that the Club's activities were not "mere religious worship" amounted to the recognition of a constitutional distinction between speech from a religious perspective and "mere religious worship."[124]

> The Court drew a line at religious worship because it did not regard worship in this case as merely a "viewpoint from which ideas are conveyed." To the contrary, pure religious worship held a purpose unto itself, and it exceeded the boundaries of a

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[119] *Id.* at 1205 (quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966)).

[120] *Id.*

[121] *Id.* at 1206 (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 139 (2001) (Souter, J., dissenting)).

[122] *Id.* at 1207.

[123] The library certainly did not seem to exclude all "controversial" uses, permitting meetings by the Contra Costa Democratic Club and Sierra Club. *Id.* at 1210. Nor did it bar uses in which participants might assert personal beliefs about – or experiences with God – hosting, for example, meetings of Narcotics Anonymous. *Id.*

[124] *Id.* at 1209.

> forum limited to a discussion of the moral and character development of children.[125]

To exclude the morning session would constitute viewpoint discrimination. In the court's view, Faith Center's proposed "Wordshop"—"an Endtime call to Prayer for every Believer, and how to pray fervent, effectual Prayers that God hears and answers" was devoted "to the topic of communication and how to communicate effectively with one's God."[126] Because groups such as a speech and debate club had been permitted to use the library meeting room, the court concluded that "'communication' is a permissible topic of discussion in the Antioch Library meeting room."[127]

Religious worship, in the majority's view, is "not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter"[128] and is "not a viewpoint but a category of discussion within which many different religious perspectives abound.[129] Although conceding that "[i]t is difficult to imagine . . . that religious worship could ever truly be divorced from moral instruction or character development," in the majority's view, *Good News Club* permits the exclusion of "pure religious worship."[130] Given that, Faith Center's proposed use was "too tenuously associated to forum's purpose."[131]

The court also regarded the presence of the meeting in a building that would be simultaneously used for other purposes as significant.[132] While the implication of this point was that the presence of religious activities might be divisive or disturbing to other patrons, the court did not explain why something called "pure religious worship" was different than the apparently heavily confessional divine communication seminar that it recognized must be permitted.

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[125] *Id.* (citations omitted).
[126] *Id.* at 1210.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 1211.
[130] *Id.* at 1211 n.14.
[131] *Id.*
[132] *Id.* at 1211-12.

Faith Center argued, predicated on *Widmar* and the *Lamb's Chapel* trilogy, that religious worship cannot be distinguished from other permissible forms of religious speech. But the majority dismissed concerns about judicial competence and the dangers of entanglement in making such a distinction. It cited, albeit to different effect, Justice Scalia's observation about the *Good News Club* Court making distinctions between speech about religion and religious speech generally.[133] The court noted that "[s]chool officials routinely draw such distinctions in public schools where the subject of religion may be taught but religious speech is barred from the government speaker,"[134] and that similar distinctions are made when limiting the kinds of religious speech by government employees in the workplace.[135]

The court also noted a line of cases permitting the restriction of proselytizing private religious speech in schools.[136] Although noting that Faith Center's morning "Wordshop" certainly involved proselytization in the form of a call to prayer, it concluded that "this proselytizing activity also furthers the discussion about communication and communicating with a higher authority . . . ."[137]

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[133] *Id.* at 1213.

[134] *Id.* (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994)).

[135] *Id.* (citing Berry v. Dep't of Soc. Serv., 447 F.3d 642, 655 (9th Cir. 2006) ("Permitting appellants to evangelize while providing services to clients would jeopardize the state's ability to provide services in a religion-neutral matter.") (internal citation omitted)).

[136] *Id.* at 1213. The court cited the following: Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1051 (9th Cir. 2003) (while holding that religious camps may not be excluded from a general policy to distribute summer camp brochures noted that a school is not obliged to distribute materials with "direct exhortations to religious observance"); Prince v. Jacoby, 303 F.3d 1074, 1086-87 (9th Cir. 2002) (finding that while student religious group must be given equal access to school's public address system to announce its activities, the group may be barred from doing so to "pray and proselytize"); Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979, 980 (9th Cir. 2003) (permitting discussion of religious beliefs in a high school graduation speech but prohibiting "proselytizing"); Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1104 (9th Cir. 2000) (upholding school district's refusal to allow valedictorian to give a "sectarian, proselytizing speech" at graduation ceremonies). Of course, all of these cases involve captive audiences that are, at least, in some sense, captive.

[137] Faith Center Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1214 (9th Cir. 2006) (Karlton, J. concurring), *vacated*, 480 F.3d 891 (9th Cir. 2007), *cert. denied*

Having suggested that a distinction between pure religious speech and other types of religious—even proselytizing speech—is possible, the court saw no need to make it (or to discuss how it might be made) because Faith Center had already done so by calling its afternoon session "praise and worship." Apparently regarding Faith Center as stuck with its own choice of nomenclature, the panel majority vacated that part of the injunction prohibiting the county from excluding that use.

Judge Karlton, sitting by designation, concurred, but wrote separately to make clear that he thought the laborious reasoning of Judge Paez's opinion ought not to have been necessary. In his view, religious speech is categorically different and should be analyzed under the Establishment and Free Exercise Clause without regard to the jurisprudence of free speech.[138] Thus, he expressed frustration at the "inability" to call a sermon a sermon.

Judge Tallman dissented, arguing that religious worship may not be parsed from other religious speech.[139] Faith Center's "concession,"[140] in his view, did not resolve the problem because it had brought a facial, as well as an "as applied," challenge:

> Announcing the strange rule that "[r]eligious worship services can be distinguished from other forms of religious speech by the adherents themselves," Maj. Op. at 1214, creates a system whereby the applicant itself decides what constitutes worship. Under the policy, the County will still have to determine what is and what is not religious worship in instances where a group does not identify in such detail its activity, and the County is not off the hook even if a group does say it will engage in religious worship. Creative word-play cannot avoid the reality that worship is intangible, and even what Faith Center itself determines is religious worship may not be worship to another. See *Bronx Household*, 331 F.3d at 354-55 (finding "no

128 S. Ct. 143 (2007).

[138] *Id.* at 1215.

[139] *Id.* at 1218-19.

[140] In addition, Faith Center did not concede that its "worship" involved no teaching about morals, character or other temporal matters. *Id.* at 1225 (Tallman, J., dissenting).

principled basis upon which to distinguish [such] activities").[141]

Noting that Faith Center did not concede that its services are "*mere* religious worship, devoid of speech on permissible secular topics,"[142] Judge Tallman suggested that the majority opinion amounted to an assertion that Faith Center "cannot express a viewpoint because of the *way* ideas are communicated–through prayer and sermon."[143] Judge Tallman suggested that it was unlikely that worship would not also convey messages about worldly matters:

> Singing a religious song may very well be akin to singing about morality according to religious tenets. Praying is usually speech containing praise to a higher being, but may also contain personal characterizations of one's own life, wishes, hopes, or concerns. Pastor Hopkins's sermon is the clearest example of religious speech which expresses a viewpoint on otherwise permissible secular topics. One can imagine the variety of subject matter that could be included in a sermon–money, family, love, or avoiding drugs and alcohol, to name few. The list is endless.[144]

A petition for rehearing en banc was denied, with six judges dissenting.[145] In the view of the dissent to the denial for rehearing en banc, *Widmar* and the *Lamb's Chapel* trilogy foreclosed the exclusion of worship and Contra Mesa County had to live with the breadth of the forum it had created:

> For example, if the library had set aside its meeting rooms for book clubs, it could certainly exclude every other category of expressive activity that did not fall within the purposes of the forum. The library could exclude worship services that were not book clubs, just as it could exclude political debates and city council meetings. What it could not do is exclude book clubs discussing the Koran, the Torah, or the Tibetan Book of

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[141] *Id.* at 1220 .

[142] *Id.* at 1225.

[143] *Id.* at 1223.

[144] *Id.* at 1225-26.

[145] Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891 (9th Cir. 2007) (denial of rehearing en banc).

> the Dead. Or the library might open its meeting rooms broadly, while prohibiting food or drink. That policy would exclude meetings at which communion might be served, or a Seder celebrated, or [P]rashad distributed, just as it would exclude serving refreshments at a Boy Scout Court of Honor or tea at a meeting of the Garden Club. What the library cannot do is permit food and drink *except* when it is consumed in connection with religious services. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993). But that is exactly what the library has done here: It has opened the forum to all community and cultural speech *except* such speech that encompasses a viewpoint that is unique to religion.[146]

The United States Supreme Court has denied Faith Center's petition for certiorari.[147]

2. Bronx Household of Faith

In *Bronx Household of Faith v. Board of Education of City of New York* (*Bronx Household I*), the Second Circuit initially held that the New York City Board of Education could deny access to the Bronx Household of Faith, a local church group, which wished to use school facilities for Sunday worship services.[148] The Board's policy, while it permitted groups to discuss "religious material or material which contains a religious viewpoint," prohibited religious organizations from conducting "religious services or religious instruction on school premises after school."[149]

Following the United State Supreme Court's decision in *Good News Club*, the Bronx Household again applied for permission to use school facilities for Sunday meetings but was once again denied access. In the ensuing litigation, *Bronx Household of Faith v. Board of Education of the City of New*

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[146] *Id.* at 900 (Bybee, J., dissenting).

[147] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194 (9th Cir. 2006), *vacated*, 480 F.3d 891 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 143 (2007).

[148] Bronx Household of Faith v. Bd. of Educ. of City of New York, 127 F.3d 207, 217 (2d Cir. 1997).

[149] *Id.* at 210.

York (*Bronx Household II*), a divided panel of the Second Circuit affirmed the district court's preliminary injunction against denial of the permit.[150]

A majority of the panel could find "no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed for its Sunday meetings . . . ."[151] It premised that holding, however, on the district court's finding that the proposed activities, which consisted both of "quintessentially religious" activities such as "prayer, the singing of Christian songs, and communion," also contained secular elements such as "a fellowship meal during which church members may talk about their problems and needs."[152] For this reason, the district judge concluded and the panel majority presumed that the proposed meetings were not "simply religious worship, divorced from any teaching of moral values or other activities permitted in the forum."[153] The Court of Appeals expressly declined to review the district court's determination that, after *Good News Club*, "religious worship cannot be treated as an inherently distinct type of activity, and that the distinction between worship and other types of religious speech cannot meaningfully be drawn by the courts."[154]

This conflict between the Second and Ninth circuits was to be short lived. Following the decision in *Bronx Household II*, the Board of Education modified its policy to prohibit use for "the purpose of holding religious worship services or otherwise using a school as a house of worship."[155] Both sides moved for summary judgment.[156] The district court enjoined enforcement of the policy, but a divided panel of the court vacated the

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[150] Bronx Household of Faith v. Bd. of Educ. of City of New York, 331 F.3d 342, 354 (2d Cir. 2003).

[151] *Id.* at 354.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 355.

[155] Bronx Household of Faith v. Bd. of Educ. of City of New York, 492 F.3d 89, 94 (2d Cir. 2007).

[156] *Id.* at 95.

injunction.[157]

Although, the panel did not resolve the merits,[158] Judge Calabresi would have vacated the injunction on the merits.[159] He placed significance on the *Good News Club* majority's statement that the speech at issue there was not "pure religious worship," but instruction on morals and character. In Judge Calabresi's view, the "boundary of [the court's] ruling must be defined by the otherwise permitted subject matter at stake."[160]

Judge Calabresi acknowledged that the activities proposed by the Bronx Household were "some of the same" at issue in *Good News*, i.e., "the singing of Christian hymns and songs along with Biblical preaching and teaching," but this was permitted "only because they could 'also be characterized properly as' the viewpoint from which students were instructed in moral and character development."[161]

Judge Calabresi's distinction of *Bronx Household's* activities turned not so much on what it did not convey, i.e., there was apparently no evidence that it did not convey instruction on morals and character development, but on what he regarded to be present in worship and not other forms of religious speech: "[p]rayer and worship services are not religious viewpoints on the subjects addressed in Boy Scouts rituals and in Elks Club ceremonies. Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false."[162] He concluded that excluding what he regarded as a separate category of speech is reasonable to avoid misunderstanding by school children, feelings of marginalization, and an inability to accommodate all faiths.[163]

Judge John Walker would have affirmed the injunction, holding that the exclusion of worship constituted

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[157] *Id.* at 91.

[158] *Id.*

[159] *Id.* at 92-106 (Calabresi, J., concurring).

[160] *Id.* at 102 (citation omitted).

[161] *Id.* at 102-3.

[162] *Id.* at 103.

[163] *Id.* at 105.

unconstitutional viewpoint discrimination.[164] The board's purpose in opening school property to the public was to "improve 'school-community relations in ways that can enhance community support for the school'" and Bronx Household's activities would fit that purpose, being aimed at "the development of a community of believers which has as its anticipated result increased community support for the school."[165] He criticized Judge Calabresi for failing to define the "limits" of the forum or to develop an objective definition of worship.[166] Even if "pure worship" could be excluded, Judge Walker could conceive of no judicially cognizable way of defining it.[167] In his view, permitting Bronx Household to use the school pursuant to a neutral access policy should not create the impression that the district has endorsed those activities and that any remaining concerns could be addressed by reasonable time, place, and manner restrictions.[168]

Judge Leval cast the deciding vote to vacate the injunction, but on the ground that the matter was not yet ripe for decision as it was unclear that the board of education had actually adopted the revised policy or how it might be applied.[169]

3. *DeBoer*

Faith Center is arguably in conflict with the decision of the Seventh Circuit in *DeBoer v. Village of Oak Park*.[170] Oak Park

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[164] *Id.* at 123-24 (Walker, J., dissenting).

[165] *Id.* at 126.

[166] *Id.* at 124.

[167] *Id.*

[168] *Id.* at 127.

[169] *Id.* at 107 (Leval, J., concurring).

[170] DeBoer v. Village of Oak Park, 267 F.3d 558 (7th Cir. 2001). *Faith Center* may rest uneasily, but is not in conflict with the decision of the Second Circuit in *Amandola v. Town of Babylon*, 251 F.3d 339 (2d Cir. 2001). In that case, the town of Babylon, New York, maintained a Town Hall Annex with meeting rooms open for community use. *Amandola*, 251 F.3d at 341. The town's access policy was silent on whether the town's facilities could be used for religious purposes. *Id.* at 342. Pastor John Amandola and the Romans Chapter Ten Ministries, Inc. requested use of the facility for Thursday evening Bible study and Sunday morning services. *Id.* at 341. Permission was granted, and the church began to meet in the Annex. *Id.* After a complaint from a town resident that the facility was being used for church services, the church's permit to use the building was

permitted public use of its Village Hall under the following conditions:

> The forum, event or activity must: (1) be open to all citizens of the Village; (2) have as its primary purpose providing a civic program or activity which benefits the public as a whole; (3) not be based on or must not promote or espouse the philosophy, ideas or beliefs of any particular group, entity or organization[;] (4) be sponsored or put on by a local not-for-profit group or organization based within the Village; (5) not be sponsored or put on by a group or organization that has sponsored or put on a forum, event or activity in the Village Hall during the preceding twelve months, unless exceptional circumstances are involved; and (6) not be a fundraising event.[171]

In 1993, 1994, and 1995, the plaintiffs were permitted to use the Village Hall to conduct a prayer service, open to all, in conjunction with the congressionally declared National Day of Prayer.[172] From 1996 through 1998, however, permission was denied, and the plaintiff filed suit.[173]

The district court granted summary judgment, holding that the Village had engaged in viewpoint discrimination.[174] The use of prayer to convey a civic message was, the court held, indistinguishable from a discussion about civic leaders from a religious viewpoint.[175] In addition, the court held that the "promote and espouse" requirement was facially discriminatory

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revoked. *Id.*

The church sued, and a magistrate judge recommended a preliminary injunction barring the town from denying the church access to its facilities. *Id.* at 341-42. The district judge, however, found that the plaintiffs did not establish irreparable harm and denied the requested injunction. *Id.* at 342-43.

The Court of Appeals reversed the denial of a preliminary injunction and remanded for entry of a declaratory injunction in favor of the plaintiffs. *Id.* at 345. Although the Second Circuit's decision in *Good News Club*, soon to be reversed, had permitted the exclusion of a religious use, the absence of a written policy foreclosed such exclusion. *Id.* at 344.

171 *DeBoer*, 267 F.3d at 561.

172 *Id.* at 562.

173 *Id.*

174 *Id.* at 563.

175 *Id.*

and that the requirement that the program or activity benefit the community as a whole granted village officials unbridled discretion in violation of the Free Speech Clause.[176]

> The [district] court disagreed with the defendants' argument that this prong actually promoted viewpoint neutrality because it mandated that "no viewpoint or all viewpoints be expressed." Rather, [the district court held] that viewpoint neutrality requires that government be indifferent to the viewpoints of speakers in its forums . . . .[177]

The plaintiffs held their event in 1999.[178] Following that service, the village moved for reconsideration presenting a transcript of the event as "newly discovered" evidence.[179] The district judge now held that the plaintiff's proposed use could be constitutionally excluded because the prayer service was primarily religious and not civic, citing the following aspects of the event:

> (1) the theme of the service was "Light the Nation with Prayer," and event leaders read and preached about passages from the New Testament and the teachings of Jesus Christ; (2) the audience was led in a hymn entitled "Heal Our Land," the verses of which contained various quotations from Jesus Christ; (3) lengthy segments of the service were "about the church itself," in which a pastor led groups in prayers for "the Church," which was defined as "the Body of Christ"; and (4) the group sang a song entitled "Shine, Jesus, Shine" and recited a closing prayer for the church and for government that praised Jesus Christ and asked for his help to "build back a great nation."[180]

Although the service also included prayer for the community, reflection upon the role of prayer in the founding of American government, and preaching that touched on a number of contemporary issues, this did not transform it into a civic

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[176] *Id.*

[177] *Id.*

[178] *Id.* at 564.

[179] *Id.*

[180] *Id.*

event.[181] Because, the district judge concluded, "the line between civic and non-civic prayer is too fine to be drawn by the law," no form of prayer could be considered civic.[182]

The Seventh Circuit reversed.[183] Relying on the Supreme Court's then-recent decision in *Good News Club*, it held that the Village's exclusion of prayer and worship as a form of communication about an otherwise permitted topic constitutes viewpoint discrimination:

> As did the school in *Good News*, here the Village attempts to distinguish between the discussion of permissible subject matter (here, civic issues) from a religious perspective and the use of prayer and religious instruction or worship to discuss or convey a message regarding such subject matter. As the Supreme Court has noted, this is a distinction without a real substantive difference. *See id.* at 2101; *Widmar v. Vincent*, 454 U.S. 263, 268 n. 6, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (noting that a distinction between religious speech and religious worship lacks "intelligible content").[184]

The *DeBoer* opinion might be reconciled with *Faith Center* through the Seventh Circuit's observation that the Village could deny "permission to conduct worship services held as part of a faith's regular religious regimen and bearing no relationship to a specific civic purpose."[185] But the Antioch Library's use policy was not limited to civic purposes, and the Ninth Circuit's opinion seems to have placed worship in a distinct category such that there was no need to examine what, if any, message it might convey.[186]

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[181] *Id.*

[182] *Id.* The district court refused, however, to vacate that portion of its judgment holding that the "promote or espouse" and "benefits the public as a whole" requirements were unconstitutional. *Id.*

[183] *Id.* at 574.

[184] *Id.* at 569.

[185] *Id.* at 570 n.11.

[186] *Faith Center* is also arguably at odds with the district court's decision in *Campbell v. St. Tammany Parish School Board*, holding that a meeting that was "primarily" but not "merely" a religious service could not be excluded. Campbell v. St. Tammany Parish Sch. Bd., No. Civ.A.98-2605, 2003 WL 21783317, at *9 (E.D. La. July 30, 2003). That court acknowledged that "[i]t is difficult to imagine any religious service, no matter how

4. Citizens for Community Values and Roman Catholic Foundation

Several district courts have addressed the question. In *Citizens for Community Values v. Upper Arlington Public Library Board of Trustees*,[187] a public library made its meeting rooms available on a first come, first served basis "for cultural activities and discussion of public questions and social issues."[188] The policy excluded use for "commercial, religious or political campaign meetings" but permitted use by "committees affiliated with a church . . . provided no religious services are involved."[189]

The plaintiff, a nonprofit religious group formed to "promote Judeo-Christian moral values for civil government" proposed a series of events called "Politics In The Pulpit," which would involve discussion of biblical and legal issues regarding involvement by the church in politics as well as a time for petitionary prayer, singing praise, and giving thanks.[190] The latter eventually caused the library to deny the group permission to use its facilities.

The court held that "the singing and prayer elements" of the proposed use "do not constitute mere religious worship, divorced from the otherwise permissible discussion elements. . ."[191] After finding "that the elements constitute speech conveying a religious viewpoint," the court concluded "that Defendant's exclusion of Plaintiff's activities from the Library's meeting rooms, pursuant to its practice of severing out

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traditional or nontraditional that does not include sermons, homilies or lessons directed at moral and ethical conduct or how one should live one's life. It is likewise difficult to imagine any after school policy that could somehow limit its scope to preclude such basic topics for discussion without creating virtually no forum at all." *Id.* Similarly, in *Roman Catholic Foundation, UW-Madison, Inc. v. Walsh*, a Roman Catholic organization at the University of Wisconsin challenged, among other things, the University's right to deny it funding for speech considered to be "prayer, worship and/or proselytizing." Roman Catholic Foundation, UW-Madison, Inc. v. Walsh, No. 07-cv-505-jcs, 2008 WL 2766267, at *2 (W.D. Wis. Jan. 17, 2008). Relying on *Rosenberger*, the district judge granted the group's motion for a preliminary injunction as to that aspect of its claim. *Id.* at *6.

[187] 2008 WL 3843579 (S.D. Ohio Aug. 14, 2008).

[188] *Id.* at *1.

[189] *Id.*

[190] *Id.* at *1-*2.

[191] *Id.* at *13.

and excluding activities it concludes are 'inherent elements of a religious service,' constitutes unlawful viewpoint discrimination, and consequently violates Plaintiff's First Amendment free speech rights."[192]

In *Roman Catholic Foundation v. Regents of the University of Wisconsin System*,[193] the court held that the university could not categorically refuse to fund activities involving "worship," proselytizing, or "sectarian religious discussion."[194] However, the court did engage in a rather extensive discussion maintaining that the university could exclude forms of worship that it deemed outside the purpose of the forum because it did not consist of "dialogue, discussion or debate."[195] Thus, the university might exclude "mechanical praise."[196]

As noted below, it is unlikely that there is much, if any, "mechanical praise" that is devoid of assertions about life in the world. While worship may or may not contain dialogue (although liturgical worship can be seen as a type of structured dialogue), it is also the case that secular meetings—particularly those of political groups—may consist of little more than affirmations of preexisting beliefs.[197]

> Further, worship, proselytizing and sectarian religious instruction, and dialogue, discussion and debate, are not mutually exclusive. An activity can integrate elements of worship and discussion, proselytizing and debate, and instruction and dialogue. An activity that includes some worship cannot be excluded on the ground that it is not "dialogue, discussion or debate" if that activity in fact includes

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[192] *Id.*

[193] Roman Catholic Foundation v. Regents of Univ. of Wisconsin Sys., 578 F. Supp. 2d 1121 (W.D. Wis. 2008).

[194] *Id.* at 1133.

[195] *Id.* at 1133-36.

[196] *Id.* at 1135.

[197] The court also suggested that the University may consider the degree to which worship contributes to a purpose of the forum. *Id.* at 1133-36. While forums such as the funding of student activities must distinguish between more or less meritorious uses, discounting uses because of the presence or absence of worship (what would be the secular equivalent of "mechanical praise") seems fraught with the potential for viewpoint discrimination.

> some dialogue, discussion, or debate. In short, before excluding an activity from the segregated fee forum pursuant to a content-based distinction, the University must explain specifically why that particular activity, viewed as a whole, is outside the forum's purposes.[198]

Although the Court seemed to believe that some form of worship might be "mere" and, therefore, excludable from forums like this, it cannot be identified by the presence of "worship-like" elements and, therefore, the state may not condition permission for an otherwise acceptable use on the excision of such activities.

B. The Significance of Worship in Public Places

1. Can the Question Be Avoided?

How important is this? The Supreme Court denied certiorari in *Glover*, and the Second Circuit's retreat in *Bronx Household* forestalls, at least for now, a clear circuit split. Good practitioners, moreover, may be able to get most uses approved by describing them as something other than worship and emphasizing something in the proposed use that can be described as communication on a matter of secular importance.[199]

Still, it seems that this is an issue that is likely to return. School districts and other units of local government remain committed to permitting off-hour and other community use of public facilities. In light of the increasing diminution (particularly within American Protestantism), of traditional organized and well-established churches, it seems likely that

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[198] *Id.* at 1134.

[199] There may be that there are traditional religious uses that cannot readily be recast as something other than worship. Indeed, the dissenters to the denial of rehearing en banc in *Faith Center* argued that a distinction between worship and other forms of "quintessentially religious" speech would discriminate in favor of "Evangelical and Unitarian" groups and against liturgically oriented denominations such as Episcopalians and Catholics. Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 901 (9th Cir. 2007). It also suggested that the distinction would favor non-theistic traditions who might conduct "highly ritualistic" religious services that they would not characterize as worship. *Id.* at 901-02.

requests for generally available public spaces will continue.

A common tenet of the church planting movement, for example, is that a start-up church ought not to immediately acquire a permanent facility, both because an initial investment in bricks and resources may not be the wisest stewardship of resources and because early acquisition of space that becomes a sunk cost may be a limiting factor in congregational growth.[200]

In addition, if we believe that there is a continuing trend toward religious diversity in the United States, then the rise of new congregations in nontraditional denominations may also contribute to a growth in groups who, lacking their own physical plants, may seek to worship in spaces made available for public meetings.

Although government could limit the uses of facilities in a way that is specific enough to exclude worship without regard to its character, i.e., by limiting the forum to discussion of the public school budget and curriculum or for instruction on arts and crafts, it is unlikely to do so. Municipalities have an incentive to make facilities broadly available both to meet the needs of taxpayers and to build affinity with the community. (The latter seems particularly salient for schools.) It seems likely then that use policies will continue to be framed in a way that is broad enough to include worship because they are likely to be concerned with facilitating the meeting of community groups or the discussion of issues "of import to" the community.

One could, of course, expressly exclude church services and worship, but that does nothing more than restate the question: if worship can be characterized as a community gathering or if it can be called a discussion of issues that are of importance to the community or that relate to culture, morals and values, then

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[200] *See, e.g.*, Richard Tatum, Church Rentals: Have Space Will Worship, Sept. 29. 2007, *available at* http://tatumweb.com/blog/2007/09/29/church-rentals (last visited Jan. 29, 2009). Professor Marci Hamilton takes a darker view of the movement suggesting that it seeks "proximity to public school students (and families) – and thus a launching pad to find converts" and to fight "what [churches] view as 'secularization' . . . in public schools." Marci Hamilton, *Must Public Schools Allow Worship if They Allow Social and Civic Meetings? A Federal Court Says Yes, But The Establishment Clause Says No*. Find Law's Writ, Dec. 1, 2005, *available at* http://writ.news.findlaw.com/hamilton/20051201.html (last visited Feb. 9, 2009).

how can it be excluded?[201]

2. Is the Question "Resolved?"

The *Glover* majority, as well as Judge Calabresi, suggested that *Good News Club* resolved the issue by drawing a constitutional distinction between worship and other forms of religious expression.[202] This is, most charitably, an overstatement and, more bluntly, flat wrong. In *Good News Club*, Justice Thomas responded, in a footnote, to dissenting Justice Souter's claim that the proposed after-school meeting was an "evangelical service of worship calling children to commit themselves in an act of Christian conversion":[203]

> Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," 202 F.3d, at 510, but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development,'" *id.*, at 511. In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values. Justice SOUTER's recitation of the Club's activities is accurate. See *post*, at 2116—21175 (dissenting opinion). But in our view,

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[201] Some scholars have criticized the Court's public forum analysis because it fails to adequately account for instances in which the government is using private parties to accomplish a stated end, e.g., the promotion of tourism or the area economy. *See, e.g.*, Mary Jean Dolan, *The Special Public Purpose Forum And Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71 (2004). In this view, the notion of "content" is insufficiently broad to limit private messages to those that serve the government's chosen end. Whatever the merits of such a view, it cannot extend to a "purpose" of picking and choosing disfavored messages in an otherwise open forum without reading the First Amendment through channels of communication provided by the government. It is one thing to say that a municipal website is reserved for users who wish to promote the area to tourists and business. It is quite another to say that a school building is open for community discussion, save for those messages that the government does not wish to have propagated or associated with the state.

[202] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1215 (9th Cir. 2006) (Karlton, J. concurring), *vacated*, 480 F.3d 891 (9th Cir. 2007), *cert. denied* 128 S. Ct. 143 (2007).; Bronx Household of Faith v. Bd. of Educ. of City of New York, 492 F.3d 89, 92-106 (2d Cir. 2007).

[203] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 138 (2001) (Souter, J., dissenting).

> religion is used by the Club in the same fashion that it was used by Lamb's Chapel and by the students in *Rosenberger*: Religion is the viewpoint from which ideas are conveyed. We did not find the *Rosenberger* students' attempt to cultivate a personal relationship with Christ to bar their claim that religion was a viewpoint. And we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys. According to Justice SOUTER, the Club's activities constitute "an evangelical service of worship." *Post*, at 2117. Regardless of the label Justice SOUTER wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in *Lamb's Chapel* and *Rosenberger*.[204]

The Court certainly observed that the activities planned by the Good News Club were not "worship divorced from any teachings of moral values."[205] But this is quite different from an assertion that worship could ever be so characterized or, if it could be, that the distinction is something within the cognizance of governments and courts, such that it can be properly excluded. To dismiss a potentially relevant distinction as inapposite because it is not present is to fail to embrace it. The issue, under standard notions of construction, is left for another day.

More important is the Court's rather unambiguous determination that the inclusion of something that might be called "worship" in the proposed activities does not justify exclusion as long as the proposed use also contains attributes within the purpose of the forum. The Good News Club's use of worship was, at least in part, in service of education regarding moral values. Because that use was within the forum's stated purpose of "(1) instruction in education, learning, or the arts and (2) social, civic, recreational, and entertainment uses pertaining to the community welfare,"[206] the use of worship to serve that purpose did not justify exclusion. If a purpose that is within the

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[204] *Good News Club*, 533 U.S. at 112 n.4.

[205] *Id.*

[206] *Id.* at 98.

scope of the forum is served, it appears that the service of that purpose by the trappings of worship, e.g., call and response, prayer, reading of sacred texts and preaching, will not justify exclusion.

IV. WORSHIP AS SPEECH WITHIN THE PURPOSES OF LIMITED PUBLIC FORUMS

If we are left with the question of whether worship is a constitutionally distinct category of speech, how are we to go about determining what about worship, if anything, might comprise this distinction? Is worship its own form of communication or does it constitute a subject matter that can, in and of itself, be distinguished from those for which limited public purpose forums are open? In assessing whether worship possesses the attributes of speech within a forum's purpose, one possibility is to look at what worshippers believe they are doing, drawing upon the characteristics of worship and its theology.

What follows is hardly an exhaustive examination of either and focuses largely on the Christian theology of worship with which I am most familiar. Nevertheless, given that in the United States most applications for worship will, for the foreseeable future, continue to come from Christians and that there is little reason to doubt that worship in other (at least theistic) traditions shares many, if not all, of the same attributes, I believe that this undertaking remains instructive. Moreover, even if all worship does not share these attributes, the difficulties attendant upon judicial divination of when it does and does not, combined with the weakness of the rationale for excluding it, suggests that we not make the effort.

A. Does Worship Communicate?

It is helpful to break this proposition apart. The notion that worship does not involve communication among or to the participants seems frequently, if not almost always, wrong. One need only attend a typical service of worship to understand that the group is affirming among its members—and communicating to newcomers—certain truths. These truths take at least two

forms—talking about God or talking about the world.

1. Talk About God

One set of truths clearly relates to claims about an extra-material reality, i.e., about God and God's relation to humankind. A classic example might be the Nicene Creed, which affirms a number of assertions about the divinity of Christ and his soteriological significance. Theologians have long remarked on the relationship between what is believed and what is prayed. The phrase *lex orandi, lex credendi*, usually translated as "[t]he law of prayer is the law of faith," is often attributed to Saint Prosper of Aquitane.[207] Prayer, in this view, states and conveys the deposit of belief.[208] Moreover, prayer both reflects and acts upon the deposit of belief.[209] For our purposes, what is important is that something is being communicated between, as opposed to simply by, the congregants.

This may, in and of itself, be sufficient to place worship within the boundaries of many community use policies. In this light, worship is certainly a cultural and educational activity, albeit one concerning itself with matters of faith.

This is particularly so if the purpose of the forum is to facilitate the development of community groups and other intermediary institutions. As Professor Kathleen Brady has explained, the notion that religion is a private and individual matter, while informing much of our Establishment Clause jurisprudence, is most recently associated with "modern" or

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[207] *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH, 291 (Libreria Editrice Vaticana) (1994) ("The Church's faith precedes the faith of the believer who is invited to adhere to it. When the Church celebrates the sacraments, she confesses the faith received from the apostles – whence the ancient saying: *lex orandi, lex credendi* (or: *legem credendi lex statuat supplicandi*, according to Prosper of Aquitane [5th cent.].").

[208] *Id.*

[209] Geoffrey Wainwright argues that this interaction is reflected in the linguistic ambiguity of the Latin in which "it is equally possible to reverse subject and predicate and so take the tag as meaning that the rule of faith is the norm for prayer: what must be believed governs what may and should be prayed." GEOFFREY WAINWRIGHT. DOXOLOGY: THE PRAISE OF GOD IN WORSHIP, DOCTRINE AND LIFE 218 (Oxford Univ. Press) (1980).

"liberal" theology.[210] More recently, post-modern theology tends to see religion as rooted in the traditions, history, and interaction within particular communities. Professor Brady writes that:

> [i]n the postliberal view, the survival of religion depends on healthy religious communities whose symbols, rituals, and values can function as an integral part of the individual's conduct and thought. If religious belief systems no longer function as the central interpretative schemes within which individuals understand their lives, then religion will wither and die.[211]

On this view, the communal affirmation and sharing of religious truths are vital to the maintenance of faith because they help to establish a community within which that faith is central.

If theologians and sociologists of religion tell us that the purpose and impact of worship is to build up the community of believers and to forge ties among those who participate,[212] then it is not clear why the state may provide a place for private individuals who choose to build community and forge ties around quilting or environmental politics but not religion. Much of what takes place in worship is expressly directed toward or at least has an effect on this end, i.e., the "passing of the peace" in Christian liturgical traditions or, in many traditions, prayers of the people in which congregants hold up the concerns of the community. While these prayers may be directed to God, they are heard by, and presumably build bonds between, the congregants. If that is so, and if the purpose of the forum is to make public facilities available for the creation of affinity groups and communities of common interest, then groups who gather to worship are performing a function within the forum's purpose.

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[210] *See*, Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 NOTRE DAME L. REV. 433 (1999).

[211] *Id.* at 498.

[212] *See, e.g.*, KATHRYN TANNER, THEORIES OF CULTURE: A NEW AGENDA FOR THEOLOGY 52 (Augsburg Fortress) (1997); GEORGE A. LINDBECK, THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE (Westminster Press) (1984).

Therefore, to the extent that policies are directed toward facilitating the growth of intermediary institutions and community groups, worship once again seems within the purpose of the forum. For those forums so broadly defined, there seems to be little justification for excluding the encouragement of religious institutions, while facilitating the development of secular ones. This practice seems to step upon the Supreme Court's insistence on neutrality between religion and irreligion as reflected in *Widmar* and the *Lamb's Chapel* trilogy. To say that all groups except religious ones may avail themselves of the forum for this purpose constitutes discrimination against religious groups. Putting aside (for now) whether such disparate treatment can be justified by the need to avoid a potential Establishment Clause violation, this certainly seems to be viewpoint discrimination.

2. Talk About the World

But let's imagine that these forums (or phrases like "educational and cultural purposes") are defined more narrowly. Assume that they are limited to communication about how we ought to live in the here and now. This may be what Judge Paez meant in suggesting that worship is "not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter."[213]

May the government exclude communication that is limited to, or in some sense, overly concerned with, extra-temporal matters? Can we say that perspectives on how we ought to live are permitted, but "pure" religious communication unaccompanied by sufficiently explicit claims regarding its temporal application is outside the scope of the forum? In this view, to make an assertion about the existence and nature of the Trinity, for example, is to make a religious claim, but that assertion, in and of itself, may not say much about how we

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[213] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1210 (9th Cir. 2006) (Karlton, J. concurring), *vacated*, 480 F.3d 891 (9th Cir. 2007), *cert. denied* 128 S. Ct. 143 (2007).

live.[214]

Of course, the temporal is unlikely to be so neatly divided from the eternal. As we have seen, religious people may, for example, go on to argue that claims about the Trinity have deep implications for the manner in which we should live. The postulation of a God consisting of three persons has been the occasion of extensive elaboration on the ways in which persons ought to live in community. That one of these persons is claimed to have become incarnate—to have become, in fact, a human being—can be seen to have profound implications for the value of human life and the created order as well as for the equal dignity of human persons.[215]

Few theological claims are without implication for life in the world. Gordon Lathrop, writing on the ecological and economic implications of the Christian Eucharist, argues that worshippers ought to (and undoubtedly many do) attend to the lesson implicit in the divine provenance, communal nature, and spareness of the Christian Eucharistic meal:

> Participation in the eucharist ought to be seen as fiercely questioning any easy cultural assumptions: that what we are is equal to what we own; that we may have all the energy we want, that what vehicle we drive is nobody's business but our own; that we should have a great variety of foodstuffs and clothing, building materials and consumer goods, drawn from all over the world at very low prices; that other people's salaries or poverty are not connected to our habits of consumption. Reminding each other of our common baptism will involve both the eucharist, the great feast-within-boundaries, and the continued discovery that these assumptions are lies.[216]

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[214] Of course the government must be evenhanded about this, and if it is to restrict communication to temporal matters, then it presumably must exclude claims about the absence of God.

[215] *See, e.g.*, DIETRICH BONHOEFER, THE COST OF DISCIPLESHIP 301 (". . . any attack even on the least of men is an attack on Christ, who took the form of man").

[216] GORDON W. LATHROP, HOLY GROUND 151 (2003). Pope Benedict XVI, in his Apostolic Exhortation, *Sacramentum Caritatis*, also emphasizes the implications of the Eucharist for recognition of the fraternal connection between humans (¶ 88-89) and regard for the created world (¶ 92).

Perhaps we can draw a distinction between the assertion of proposition based upon (or with implications for) religious presuppositions and the religious presuppositions themselves, i.e., the assertion of beliefs about God or other theological propositions. On this view, what is constitutionally significant is the assertion of "pure" religious claims. It is the nature of those claims—and not their implications for life in the world—that may (or perhaps must) be prohibited to speakers, or excluded from forums too closely associated with the government. This type of distinction is not unknown in addressing the interplay of church and state. Indeed, it is precisely such a distinction that explains, in the view of some scholars, why government may not promote nor, under certain circumstances, even countenance prayer, while it can itself engage in speech that contradicts or is actively hostile to the faith of certain citizens.[217] As long as we are not speaking directly about God, the fact that what we are saying about secular matters has profound implications for various beliefs about God does not matter. But, if we are speaking directly about God or matters of faith, we have moved into a different category of discourse—at least for Establishment Clause purposes.

My own view is that this distinction, particularly in the context of free speech analysis, is recommended more by its convenience than its logical force. The distinction between theological claims pregnant with temporal significance and the more explicit exposition of how they apply to life in the world seems tenuously related to any real concerns about religious liberty or establishment, such that we might treat them as categorically distinct.

If our concern is about the protection of those who do not

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[217] *See, e.g.*, Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 726 (2003) (arguing that communication that "logically entails" the negation of a theological proposition need not have that "social meaning"); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1082 (1996) (arguing that as long as schools have not taught "that there is no God," the fact that they have taught "moral and social values associated with secular humanism" that are incompatible with some students' religious views is not problematic).

share the religious beliefs expressed in the forum, those who object to a set of religious presuppositions will not feel much differently if groups meeting in the local school building limit themselves to discussion of the implications of those premises rather than a "pure" consideration of the premises themselves.

If our concern is about the effect that a government provided forum may have on the religious choices of its citizens,[218] the distinction does not obviously serve the neutrality required by *Widmar* and the *Lamb's Chapel* trilogy. Particularly, if a forum permits the expression of views about ultimate meaning and the prime source of values, the exclusion of religious claims about these things ("There is a God," "He gave us the Bible [or the Koran]"), would seem to violate the requirement of neutrality.

In any event, few worship services will stop at the statement of fecund theological concepts without more.

B. Worship and the World

Characterizing worship as any one thing is a fool's errand. Nor can worship be reduced to a form of communication about the material world. But if a brief examination of the theology of worship suggests that it is likely to convey information about that world, it seems unlikely that worship will not communicate content within the meaning of most public forums.

Theologian Hughes Oliphant Old divides Christian worship into a variety of categories, each of which may potentially involve assertions about life in the world.[219] *Epicletic doxology*, according to Old, is an invocation of the divine.[220] The worshipping community brings its needs to God, but, in doing so, it defines those needs, not only for the God whose mercy and care the community invokes, but also for the community itself. So, as Old points out, by citing the prayer of the ancient Israelis

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[218] *See. e.g.*, Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 83 (2007).

[219] *See generally*, HUGHES OLIPHANT OLD, THEMES AND VARIATIONS FOR A CHRISTIAN DOXOLOGY (1992).

[220] *Id.* at 17.

for deliverance from bondage in Egypt, this is likely to occur "when we discover we are creatures of need. . . ."[221] In other words, when a congregation brings to their God some temporal need, they are communicating something about what in the world requires change.[222] For example, standard intercessory prayers in the Episcopal Church's Book of Common Prayer hold up the concerns of the poor and oppressed and call for proper stewardship of the earth.[223] It is not uncommon for liturgical prayer to direct adherents to act in the world.[224] While Christians of differing political persuasions might disagree as to the meaning of these imperatives, that they are imperatives is a temporal—and civic—assertion.

Indeed, one could see the collection of alms, often taking place in the course of worship, as a form of proclamation:

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[221] *Id.* at 18.

[222] Although one could argue that, in calling for a Divine resolution, worshippers are not proposing to do anything about it themselves, this seems an overly restrictive view of how people identify and respond to problems. Much of our political speech, for example, does not focus on solutions as much as it identifies problems. While one could dismiss this as pointless harping, viewpoint neutrality would seem to require that all "pointless harping" be treated equally and, in any event, the dismissal would seem to ignore the iterative way in which people and communities identify and respond to problems.

[223] *See, e.g.*, THE BOOK OF COMMON PRAYER AND ADMINISTRATION OF THE SACRAMENTS AND OTHER RITES AND CEREMONIES OF THE CHURCH 383 (Oxford University Press 1990) (noting that the prayers of the people are "offered with intercession for . . . [t]he Nation and all in authority, [t]he welfare of the world. [t]he concerns of the local community, [and] [t]hose who suffer and those in any trouble"). *See, e.g.*, *id.* at 384 ("For the poor and the oppressed, for the unemployed and the destitute, for prisoners and captives. . . .") (citing The Prayers of the People, Form I); *id.* at 386 ("I ask your prayers for the poor, the sick, the hungry, the oppressed, and those in prison.") (citing Form II); *id.* at 388 ("Give us all a reverence for the earth as your own creation, that we may use its resources rightly in the service of others. . . .") (citing Form IV); *id.* at 390 ("For a blessing upon all human labor, and for the right use of the riches of creation, that the world may be freed from poverty, famine, and disaster. . . .") (citing Form V); *id.* at 392 ("For the just and proper use of your creation") (citing Form VI). Similar sentiments are expressed in The Great Thanksgiving. *See id.* at 370 (referring to this "fragile earth, our island home") (citing Eucharistic Prayer C); *id.* at 374 ("To the poor he proclaimed the good news of salvation; to prisoners, freedom . . . ") (citing Eucharistic Prayer D).

[224] *See, e.g.*, BOOK OF COMMON PRAYER 376 ("If you are offering your gift at the altar, and there remember that your brother has something against you, leave your gift there before the altar and go; first be reconciled to your brother, and then come and offer your gift.") (citing Offertory sentence, quoting Matthew 5:23-24).

> A positive contribution of twentieth-century American Protestantism to the theology of worship has been its development of the concept of stewardship. The giving of alms for the support of the suffering, the poor, and the neglected has become an increasingly important liturgical concern. This is expressed by the fact that the collection of alms is made during the service of worship rather than before it or after it.[225]

The significance, as Old points out, is that "[f]aithful Christian worship issues in generous Christian service."[226]

Kergymatic doxology is worship involving proclamation, *e.g.*, of witness to others. This proclamation may be of another worldly truth, but it can also relate, directly or by analogy, to temporal affairs. Again, Christian concepts of divine incarnation or of the death and resurrection of Christ as an act of universal salvation have significant implications for human dignity and equality. These implications may simply be pregnant in their assertion as doctrinal claims, or as implications from theological practice. For example, Geoffrey Wainwright's highly acclaimed work on Christian worship, DOXOLOGY, argues that Christian worship provides a foundation for *Liberte, egalite, fraternite*, the slogan of the French Revolution and a summary of "the best aspirations of modern western secular humanism."[227] For Wainwright:

> The Christian liturgy provides an opportunity and a pattern for forgiveness, reconciliation and mutual love. Eucharistic rites traditionally include the confession of sins against others, prayers of intercession for people, the exchange of peace, and the sharing of the one bread and the one cup in table fellowship.[228]

These principles may frequently be brought home by expository preaching. In fact, for Old, preaching belongs to the

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[225] *See* Old, *supra* note 219, at 109.

[226] *Id.* at 110.

[227] GEOFFREY WAINWRIGHT, DOXOLOGY: THE PRAISE OF GOD IN WORSHIP, DOCTRINE, AND LIFE 415 (1980).

[228] *Id.* at 421.

"kerygmatic dimension of worship."[229]

Prophetic doxology involves the making of claims about the world to come—perhaps out of time but also within it.[230] Wainwright notes, as a particular and historic example, the significance of worship for African-American Christians, citing the work of black theologian James Cone. Cone saw the eschatology of the African-American church congregation as one in which people believed that "the Spirit of Jesus is coming to visit them in the worship service each time two or three are gathered in his name, and to bestow upon them a new vision of their future humanity."[231] Cone wrote:

> The Holy Spirit's presence with the people is a liberating experience. Black people who have been humiliated and oppressed by the structures of white society six days of the week, gather together each Sunday morning in order to experience a new definition of their humanity. The transition from Saturday to Sunday is not just a chronological change from the seventh to the first day of the week. It is rather a rupture in time, a *kairos*-event which produces a radical transformation in the people's identity. The janitor becomes the chairperson of the Deacon Board; the maid becomes the president of Stewardess Board Number I. Everybody becomes Mr and Mrs, or Brother and Sister. The last becomes first, making a radical change in the perception of self and one's calling in the society. Every person becomes somebody, and one can see the people's recognition of their new found identity by the way they walk and talk and 'carry themselves'. They walk with a rhythm of an assurance that they know where they are going, and they talk as if they know the truth about which they speak. It is this experience of being radically transformed by the power of the Spirit that defines the primary style of black worship. This transformation is found not only in the titles of Deacons, Stewardesses, Trustees, and Ushers, but also in the excitement of the entire congregation at worship. To be at the end of time where one has been given a new name requires a passionate response with the felt power of the Spirit

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[229] *See* Old, *supra* note 219, at 56.

[230] *See id.* at 91.

[231] Wainwright, *supra* note 227, at 419.

in one's heart.[232]

Cone cited a traditional African-American prayer:

> And now, Oh, Lord, when this your humble servant is done down here in this low land of sorrow; done sitting down and getting up; done being called everything but a child of God; Oh, when I am done, done, done, and this old world can afford me a home no longer, right soon in the morning, Lord, right soon, meet me at the River of Jordan, bid the waters to be still, tuck my little soul away in your chariot, and bear it away over yonder in the third heaven where every day will be a Sunday and my sorrows of this old world will have an end, is my prayer for Christ, my Redeemer's sake, and Amen and thank God.[233]

As Wainwright puts it, only an "insensitive fool" would dismiss this as "escapism" or "other worldliness."[234] One of the most significant Old Testament prophets was Amos whose authority was invoked by the Rev. Dr. Martin Luther King in his speech on the steps of the Lincoln Memorial on August 28, 1963, when he yearned for the day when "justice rolls down like waters and righteousness like a mighty stream."[235] Had Dr. King slipped into worship on the Washington Mall such that his speech might be excluded from a forum on civil rights? If the answer is yes, the question is wrong.

Old defines *wisdom doxology* as, for Christians, a "disciplined study of the Scriptures as the revelation of the divine Wisdom that enlightens all human life."[236] It is not unusual—it is typical—for religious adherents to believe that their sacred texts say something about how to live, be it calls to forgiveness, charity, or prescriptions about family life.

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[232] *Id.* at 419 (citing James H. Cone, *Sanctification, Liberations, and Black Worship*, THEOLOGY TODAY 139, 140-41 (1979)).

[233] *Id.* at 420 (citing BOOK OF NEGRO FOLKLORE 256, 256-57 (Langston Hughes & Arna Bontemps, eds., 1958)).

[234] *Id.* at 419.

[235] Rev. Dr. Martin Luther King, Jr., Address at the Lincoln Memorial (Aug. 28, 1963) ("I Have A Dream" speech) *available at* http://avalon.law.yale.edu/20th_century/mlk01.asp (last visited Jan. 6, 2009). *See also Amos* 6:24.

[236] Old, *supra* note 219, at 64.

Finally, *covenantal doxology*—worship that emphasizes the community and that is a self-conscious communal act—is part and parcel of the formation of religious communities. While worship of and service to the divine might be a private and individual matter, for many believers, it is not.

The earliest exposition of Christian worship, Paul's First Letter to the Corinthians, made clear that worship was to be understood as a corporate covenant with Christ with profound implications for how the members of the body ought to treat one another:

> Now Paul turns to a particular problem in the celebration of the Lord's Supper. The Supper had become a feast in which those who had plenty feasted while the poorer members of the community went hungry. In the covenant bond, those who have plenty must share with those who do not.[237]

Protestant theologian Karl Barth argued that the theological claims of Christianity and its implications could not be kept to oneself. Preaching, he argued, was a message that bore repeating:

> It is basically an expository word, the explaining and applying of Holy Scripture as the primal witness to Jesus Christ which underlies and sustains all the rest. It is when I speak a word like this to my neighbor that I fulfill my responsibility to Him.[238]

Of course, it can be argued that these messages are likely to possess varying degrees of specificity and detail. Admonitions to "love" and "forgive" and care for the least of these are extremely general and more evocative than prescriptive. Perhaps it can be said that worshipful invocations to charity will convey less hard information (but perhaps prompt more action) than a lecture on welfare reform. But this is unlikely to distinguish religious worship from other uses of the forum, such as the Boy Scouts' promotion of young men who are "physically strong, mentally

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[237] Old, *supra* note 219, at 118.

[238] KARL BARTH, CHURCH DOGMATICS: I.2 THE DOCTRINE OF THE WORD OF GOD 443 (Continuum Int'l Publishing Group) (2004).

awake, and morally straight."[239]

Of course, one could make the objection that not all worship may have these characteristics, say silent adoration of the sacrament or Muslim prayers recited entirely to one self (although they may have a community building character and may constitute symbolic communication to or among the participants). At this point, however, the issue of judicial competence asserts itself. How is a court to tell? Can we trust courts to make such distinctions about religious traditions that may be foreign from or even hostile to their own?[240]

V. IS WORSHIP ITS OWN CATEGORY OF COMMUNICATION?

A. Is There Something About Worship?

But what of the fact that worship may possess something "extra," whether it be, as Judge Calabresi would have it, "adoration" or some form of (at least claimed) communication with, or assertions about, the divine. There is certainly something to that claim.

Indeed, the frequent use of the term "doxology" (generally meaning "praise of God") to refer to the theology of worship, confirms this. Certainly those who worship believe that however much worship may communicate about worldly matters, it is qualitatively different than a lecture or roundtable discussion. For most, worship also constitutes communication with or even the presence of the divine. Maybe this could justify treating worship as a distinct category of speech. It is not that it cannot constitute communication of subject matter within the scope of the forum, but that the way in which it communicates that subject matter—or what it couples that communication with—justifies treating worship differently. Can we say that there is something about religious speech that not only makes

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[239] Boy Scouts of America, *available at* http://www.scouting.org/BoyScouts.aspx (last visited Feb. 9, 2009).

[240] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 270 (1981), *aff'g* Chess v. Widmar 635 F.2d 1310 (8th Cir. 1980).

theological claims but also directs them to a God that others believe may not be there (or who, they believe, may not wish to be addressed in this way) that places it into a different category of communication?

There are at least three difficulties with this proposition. The first is doctrinal. After *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, the argument that this "something extra"—be it the assertion of theological truths or the invocation of or direction of communication to God—does not, in and of itself, remove communication from the scope of a forum in which it would otherwise fit. In other words, the mere presence of these characteristics seems to be an impermissible basis for the relegation of speech into a separate category of content. The *Lamb's Chapel* trilogy seems more concerned with the presence or absence of temporal communication than its accompaniment by prayer or theological content. *Rosenberger*, as we have seen, involved "[a] straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ."[241] *Good News Club* involved, essentially, an "evangelical service of worship,"[242] albeit one that conveyed teachings on moral and character development.[243] If that is so, then the distinction of worship would be a function of determining whether prayer and other attributes of worship predominate.

Second, if we accept this aspect of *Lamb's Chapel* and its progeny as fixed, it is difficult to know where mere religious perspectives on secular subjects end and worship with secular implications begin. Imagine, for example, a speaker who argues that "our loving God calls us to concern for the poor" and ends by urging that her audience "in silence, hold that concern in our hearts." When we must accept that the mere presence of things like worship is not enough—that we must decide whether a proposed use involves "too much" worship and not enough

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[241] Rosenberger v. Rector, 515 U.S. 819, 867 (1995) (Souter, J., dissenting).

[242] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 138 (2001) (Souter, J., dissenting).

[243] *Id.* at 111 (majority opinion).

temporal communication—the task becomes that much harder.

It is not that the distinction is meaningless. There may be a discernable difference between a speaker detailing the ways in which the New Testament creates a moral imperative of concern for the poor and one who calls upon God to open the hearts of the rich and to grant the hungry and the homeless delivery from material need. But it may not be a difference that we want governmental agencies and courts, who we charge to be neutral about and among religions, and whose dictates have the force of law, to make. While the presence of hard questions is a rather common feature of legal rules and principles, the nature of this question and the work required to answer it would involve courts in an assessment of religious doctrine and language.

Of course, courts do make distinctions between the ways in which government is permitted to speak about religion.[244] Schools can teach courses in comparative religion, describing, but not advocating, doctrine.[245] Although that distinction could be adopted here, it does not quite fit the purpose of most state-sponsored forums. We are now concerned with government rather than private speech, and there is a material difference between self restraint and censorship. These forums normally do not require neutrality toward the topic to be discussed. If, for example, the purpose of the forum is "moral and character development," we can expect speakers to assert that certain moral propositions and character attributes are good. In other words, advocacy is permitted.

Once we abandon neutrality, the judicial task is dramatically changed. A judge is no longer attempting merely to determine whether a speaker is advocating something about which the court will make no judgment but trying to discern what that something is and how to characterize it within categories (worship or not) requiring an assessment of their theological significance. While it is possible to imagine a judicial form of content analysis in which courts attempt to assess the

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[244] *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963); *Good News Club*, 533 U.S. at 127 n.3 (Scalia, J., concurring).

[245] *Schempp*, 374 U.S. at 225.

relative proportion of "pure" and "applied" theology in a proposed use, it is hard to imagine the judge who would wish to undertake it and unlikely that the Supreme Court would countenance it. The risk of entanglement and the danger of cultural or religious bias in such an analysis suggest that it is a task left unattempted.

B. The Preservations of Social Peace and Nonestablishment

But even if we put this difficulty aside, what justifies treating religious advocacy that constitutes worship (by including this "something extra") differently than that which does not? It cannot be, as we have seen, that it does not communicate messages of secular concern with temporal implications. What is it about worship that might justify its exclusion? What I suspect motivates most school districts and municipalities to restrict public access for worship is (1) a fear of divisiveness or (2) a commitment to a vaguely understood concept known as the separation of church and state.

1. *Avoiding Divisive Uses*

Justice Stevens argued that governmental bodies—or at least school districts—are free to bar meetings designed to recruit members at least to political and religious groups.[246] "Such recruiting meetings may," in his view, "introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission."[247] Putting aside the fact that *Good News Club* apparently forecloses such an exclusion, the distinction between advocacy of a religious perspective on a particular issue and an invitation to adopt that perspective is unclear.

Nor does it seem possible to distinguish proselytization or recruiting that involves "divisive" or "controversial" topics from those that do not.[248] Perhaps a government could exclude any

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[246] *Good News Club*, 533 U.S. at 131 (Scalia, J., concurring).

[247] *Id.* (citation omitted).

[248] *See, e.g.*, DeBoer v. Vill. of Oak Park, 267 F.3d 558, 571 (7th Cir. 2001) (stating that the village could not exclude all speeches that "promotes or espouses" a point of

use that is likely to be controversial, but it seems unlikely that many will. Almost any such exclusion is likely to be less than complete, raising the prospect of viewpoint discrimination.

In any event, a principle requiring the even-handed exclusion of everything that might be deemed controversial or divisive hardly seems to be workable. There is little of any significance that will not be controversial to some, and excluding only that which is objected to by some significant number would seem to constitute the imposition of at least a broad form of orthodoxy. At least when government does not seek to convey a message of its own, it is difficult to see how this would not constitute viewpoint discrimination.

It seems, then, that a governmental body would have to argue that religion is uniquely divisive. In his recent book, *Active Liberty*, Justice Breyer makes such an argument,[249] and there is a long tradition of such claims in Establishment Clause jurisprudence and commentary.[250] There are substantial criticisms of such arguments,[251] and it is far from clear that a majority of the Court believes that religion is uniquely divisive.

More to the point, this view has not prevailed when it comes to excluding even quintessentially religious private expression from neutrally available public facilities. Justice Breyer, after all, dissented in *Rosenberger* and *Good News Club*. As we have seen, worship would seem to fulfill the purposes generally associated with public forum. It is not at all clear why worship—generally conducted at a higher level of generality—would be more divisive than, say, an evangelical lecture on

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view).

[249] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 120-21 (Vintage Books 2006) (2005).

[250] Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring); Zelman v. Simmons-Harris, 536 U.S. 639, 715-16 (2002) (Souter, J., dissenting). *See also* Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutionalism Secularism*, 2004 BYU L. REV. 1005, 1017.

[251] *See, e.g.*, Richard W. Garnett, *Religion, Division and the First Amendment*, 94 GEO. L. J. 1667 (2006) (arguing that concerns about "political division along religious lines" should not supply the enforceable content of nonestablishment). It is far from obvious that religious differences are uniquely fundamental or divisive. *See, e.g.*, Noah Feldmen, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 717 (2002).

same-sex marriage.

2. Avoiding Establishment (Or Its Appearance)

Can the exclusion of worship be justified by the desire to avoid an Establishment Clause violation? The Supreme Court has certainly suggested that avoiding an Establishment Clause violation might be a compelling state interest,[252] although in *Widmar* and the *Lamb's Chapel* trilogy, it declined to find one.

The doctrinal tests for an Establishment Clause violation are, of course, imprecise and susceptible to manipulation. Under the Court's on-again, off-again test in *Lemon v. Kurtzman*,[253] it seems unlikely that there would be an Establishment Clause problem.

For example, whether the government's provision of public access in a way that would permit worship serves a secular purpose depends on the level of generality with which one describes the policy. If the question is whether there could be a secular purpose in permitting worship on public property, one's initial reaction is to say "no." But that would be the appropriate test only if the government had decided to permit public access for worship only. The proper question, as *Lamb's Chapel*, *Rosenberger*, and *Good News Club* make clear, is whether there is a secular purpose in a policy that would permit a broad variety of communication that might include worship, and, as noted above, it would seem that there is. The Court has, moreover, recognized that avoidance of the appearance of discrimination against religion may constitute a constitutionally permissible secular purpose.

Such a policy would neither advance nor inhibit religion. As others have noted, because this prong of the *Lemon* test is disaggregated,[254] the outcome can once again be manipulated by the level of generality with which one views the policy.

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[252] *See, e.g.*, *Good News Club*, 533 U.S. at 112-13; Widmar v. Vincent, 454 U.S. 263. 271 (1981), *aff'g* Chess v. Widmar 635 F.2d 1310 (8th Cir. 1980)..

[253] *See supra* notes 48-49 and accompanying text.

[254] *See* Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1993).

Neutrality toward religion can be advanced as opposed to a policy that would exclude it in favor of an entirely secular forum. On the other hand, that exclusion could be said to inhibit religion. *Lamb's Chapel* and its progeny seem to stand for the proposition that including religion pursuant to some neutral and noncoercive policy is not in and of itself an Establishment Clause violation such that excluding it can be justified by that basis.

The potential for entanglement, of course, seems greater if government actors undertake to determine what is and is not worship. Of course, as some have pointed out, there are areas in which we make distinctions about religious speech, e.g., we distinguish government speech about religion from a secular perspective from government proselytization or government endorsement of religion. But this is a broader—and more easily discerned—category than the distinction between religious speech about secular topics (which may endorse and seek to persuade adherence to a religious worldview) and worship without secular content. While it may be easy to determine whether one is "worshipping" in the sense of praising a divine being or presence or seeking to communicate with some extra material being or reality, it is much tougher to say whether or not that praise or communication has some import for how one is to live in the world. In fact, since most forms of worship will probably include something that can be construed as such a claim, the real question is likely to be whether those claims are sufficiently substantial to fall within the purpose of the forum. It is hard to imagine anything that is more susceptible to entanglement and to the potential for application biased by a judge's preexisting religious presuppositions.

One might reframe the state's Establishment Clause concern in terms of the endorsement test. As framed by Justice O'Connor, religious expression by the state is forbidden when its purpose or effect is to endorse religion or nonreligion or one religion over another.[255] Endorsement, in her view, "sends a

[255] In *McCreary*, the Court came close to suggesting that impermissible endorsement will almost always have a "purpose" to advance religion or, more accurately, the "reasonable observer" would perceive a purpose to take sides on religious questions. *See*

message to nonadherents that they are outsiders, not full members of the political community."[256] That message is to be assessed in terms of a hypothetical reasonable observer familiar with the text and background of both the First Amendment and of the challenged practice.[257]

Doctrinally, *Lamb's Chapel* and its progeny foreclose an argument that the expression of religious sentiments on public grounds amounts to an endorsement. While worship may be higher octane religion, our reasonable and knowledgeable observer was apparently presumed to know why it has been permitted, i.e., pursuant to a neutral policy of public access.[258] While a closer case may be presented where worship activities might be observed by others, *Good News Club* involved an after school program, suggesting that one can run a "quintessentially religious" program in fairly close proximity to school children without raising endorsement concerns.

In one sense, *Glover* may have been a more difficult case

McCreary County v. ACLU, 545 U.S. 844, 863 (2005) ("If someone in the government hides religious motive so well that the 'objective observer' . . . cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides."). *But see* Zelman v. Simmons-Harris, 536 U.S. 639. 707 (2002) (Stevens, J., dissenting) ("And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sake of channeling money into religious institutions.").

[256] County of Allegheny v. ACLU, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor. J., concurring)).

[257] Some courts have seen the endorsement test as a refinement of the first two prongs in *Lemon* (i.e., "purpose" and "effect"). *See* Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 770 (7th Cir. 2000). Other courts have considered it to be a refinement of the effects prong. *See* ACLU v. Ashbrook, 375 F.3d 484, 503 (6th Cir. 2004). Again, in *McCreary*, the Court came close to eliding the two, suggesting that there is unlikely to be an "effect" without a "purpose." *See* McCreary County v. ACLU. 545 U.S. 844 (2005). The endorsement test has attracted a fair number of critics. *See, e.g.*, Richard M. Esenberg, *You Cannot Lose If You Choose Not To Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1 (2006) and sources cited therein.

[258] In any event, a less restrictive alternative would be to merely require. as the Seattle Public Schools do, that "[a]ctivities of such groups should be clearly separated from school-sponsored activities so that the School District does not support. or appear to support, the practice of religion." Seattle Public Schools, Use of School Facilities By Religious Groups Policy, *available at* http://www.seattleschools.org/area/policies/e/e55.00.pdf (last visited Jan. 27. 2009).

than *Good News Club* in that the religious activity in the Contra Mesa public library was to take place while other users of a public facility would be present, while at least most (but perhaps not all) users of the Milford School would not be present for the meeting of the *Good News Club*. But if our knowledgeable observer is presumed to know that religious perspectives on secular subjects—even those that claim the perspective to be true and which might be accurately characterized as "quintessentially religious" involving prayer and singing and calls for religious commitment —are not endorsed by the government but merely permitted pursuant to a neutral policy of public access, then it is unclear why she would not know the same thing with respect to something which we might be willing to characterize as religious "worship."

Although religious services are often periodic and regular and, it is feared, may come to dominate the forum, the regular and repeated meetings of the Good News Club did not amount to endorsement. In any event, permitting an equal chance for all groups to have access to a forum is a matter of reasonable time, place, and manner regulation. It does not require the exclusion of any particular group but evenhandedness toward all.

But this does not completely dispose of an Establishment Clause justification. Perhaps support for the exclusion of worship can be found in the Supreme Court's decision in *Locke v. Davey*,[259] in which the Court held that the state of Washington could refuse to permit the use of a generally available scholarship program to fund preparation for the ministry without violating a student's free exercise rights.[260] The Court had earlier found that the availability of such scholarships for such study would not violate the Establishment Clause,[261] but held in *Locke* that there is a "play in the joints" permitting the state to decline to fund religious activities that it would be permitted to fund.[262]

Locke rests uneasily with the *Lamb's Chapel* trilogy

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[259] 540 U.S. 712 (2004).

[260] *Id.*

[261] Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986).

[262] *Locke*, 540 U.S. at 719-25.

because it appears to permit departure from neutrality to exclude a religious use that is arguably comparable to permitted secular uses.

Some have argued that *Locke* means that government may discriminate in favor of a secular state.[263] Such a broad reading is hard to reconcile with much of the Court's recent jurisprudence mandating equality between religion and irreligion.[264] Others have seen *Locke* as a case about whether or not there is a constitutional compunction to spend money on religiously related entities.[265] Opening forums presumably requires the expenditure of some resources as well, although once the forum is open, it presumably costs little to extend it equally to religious entities. Time is finite, and facilities can only be used so many hours of the day. Funding those who seek to study for the ministry clearly requires the government to spend more than it otherwise would.

Perhaps *Locke* stands for the proposition that a state may decline to fund core religious functions too closely associated with the running of a church.[266] That rationale might well apply to permitting public facilities to be used for regular worship services.[267]

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[263] *See, e.g.*, Laura S. Underkuffler, *Davey and the Limits of Equality*, 40 TULSA L. REV. 267, 268, 272 (2004).

[264] In addition to the *Lamb's Chapel* trilogy, *see* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (approving state plan permitting school vouchers to be used in both secular and sectarian private schools).

[265] *See, e.g.*, Frederick Mark Gedicks, *The Establishment Clause Gag Reflex*, 2004 BYU L. REV. 995, 1001. Others have noted an ambiguity in *Locke* between a general principle that religious entities need not be funded or a more narrow rule absolving the government of an obligation to fund the training of clergy on the same basis as other educational funding. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 184-87 (2004); Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 229-30 (2004).

[266] *Locke*, 540 U.S. at 719-20.

[267] Indeed, the Seventh Circuit suggested in *DeBoer* that the village of Oak Park would not have engaged in viewpoint discrimination had it "denied permission to conduct worship services held as part of a faith's regular religious regimen and bearing no relationship to a specific civic purpose." DeBoer v. Village of Oak Park, 267 F.3d 558, 570 n.11 (7th Cir. 2001).

On this view, the question would not be whether any of the communications proposed for a state-sponsored forum is akin to worship but whether the proposed use, as a whole, constitutes worship, i.e., consists of assertions of doctrine and communications directed to the divine. Perhaps the regularity of the meetings would matter. The argument would be, not that the state must exclude worship to avoid an establishment violation, but that it can do so to avoid the appearance of one. The exclusion of religion would be within the Establishment Clause's "play in the joints."

But this may not translate well into cases involving state-sponsored forums which involve not simply free exercise and Establishment Clause values, but free speech concerns. *Good News Club* seems to say that these free speech concerns require permitting an awful lot of communication that seems like worship as long as it is within the purpose of the forum. While it reserved the possibility that something called "pure worship" might be excluded, there is, as we have seen, unlikely to be any such thing. Again, we could imagine a court conducting an exacting content analysis to see if there is too much "high octane" or "pure" religion in a proposed use, or whether it is too much like whatever the court views as a church service. But there is no more precise standard that would not require assumptions about what is and what is not worship and a determination of what dissidents are likely to find sufficiently objectionable. That standard will almost certainly be influenced by cultural and religious biases. The undertaking would seem to tax judicial competence with no clear advantage.

VI. CONCLUSION

The inclusion of worship within broadly defined limited purpose public forums where it communicates content within the forum's purpose is consistent with a larger recognition of the role that religion plays in civic life and a recognition that true neutrality between religion and irreligion cannot be achieved by the creation of secular public spaces or publicly-sponsored "religion-free" dialogues bearing on matters to which religion speaks. If the government intends to facilitate the growth of

community and the development of private values by providing spaces and other opportunities for the discussion and promotion of a variety of political, social, moral and philosophical perspectives, its exclusion of religious perspectives is not neutral. If the private speakers invited by the government to speak on these matters believe that they are best approached from a religious perspective, then government merely respects—rather than prefers—religious perspectives by permitting them to speak.

Even if the exclusion of religious perspectives could somehow be limited to uses that assert "core" or "extra-temporal" theological truths, the constitutional imperative of neutrality between religion and irreligion suggests that the state may not permit its facilities to be used for the promotion of secular sources of ultimate meaning or foundational principles and not religious ones.

This is not, of course, the only way to view the question of nonestablishment. If one sees that principle as opting for a rule of secular public places, whether based on the view that religion is uniquely divisive or that public discourse in a pluralistic society is best limited to "secular" rationales that all can assess, perhaps religion ought to be eliminated from government forums. But that is not the view adopted by a majority of the Supreme Court as reflected in *Widmar*, the *Lamb's Chapel* trilogy, and other cases[268] recognizing that the choice by private individuals to devote neutrally available public resources to religious purposes does not run afoul of the Establishment Clause.

Of course, these private choices might involve "worship" in the sense of invoking the intercession of a deity, or communicating with that deity, or affirming beliefs about that deity, but it does not place them outside the general principle of neutrality toward religious choices by private actors. Worship may still communicate ideas within the boundaries of most limited purpose public forums, and its unique characteristics do

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[268] *See, e.g.*, *Zelman*, 536 U.S. at 639 (2002); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

not justify its exclusion. Permitting private individuals to use neutrally available public spaces to express these ideas in this way is consistent with the mandate of evenhandedness between religion and irreligion.

ROOTING FOR THE RESTYLED RULES (EVEN THOUGH I OPPOSED THEM)

*Jeremy Counseller**

I. INTRODUCTION 521
II. EVEN A CRITIC CAN ROOT FOR THE RESTYLED RULES 524
A. *The Restylists and Their Effort Command Respect* . 524
B. *The Burbank-Joseph Group Improved the Restyled Rules* 538
III. CRITICS *MUST* ROOT FOR THE RESTYLED RULES .. 542
A. *There's No Going Back to the Old Rules (Even If We Should)* 543
B. *We Should Not Go Back to the Old Rules* 544
IV. MAXIMIZING THE LIKELIHOOD OF THE RESTYLED RULES' SUCCESS 550
A. *The Advisory Committee Should Repair Two Substantive Changes Resulting from the Restyling* . 550
1. The Advisory Committee Should Reinsert Former Rule 26(a)(5) 552
2. The Advisory Committee Should Replace the Written Stipulation Requirement in the Discovery Rules 554
B. *The Advisory Committee Should Continue to Resist Any Call for a Rule of Construction to*

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Prevent Supersession 558
1. Rule 86(b) Prevents Restyling Supersession 560
2. A Rule of Construction Would Exacerbate Interpretational Difficulties 563
V. CONCLUSION 565

Abstract

The Restyling Amendments of December 1, 2007, made top-to-bottom changes to the text of the most important and successful set of rules in the American civil justice system. These amendments are the culmination of more than fifteen years of work by members of the Rules Committees and their style consultants. The goal of these Restylists was to redraft the Rules to improve style and clarity without changing meaning. In short, they sought to achieve "clarity without change." The Restylists are confident they achieved this goal, but not everyone shares their confidence. Critics worry that the Restylists made unwanted changes to the law of procedure, despite their best efforts to avoid them. Critics also believe that improving merely the style and clarity of Rules did not justify the costs of transitioning from one set of rules to another and that the Restylists may have sacrificed other more important reforms on the altar of the Style Project. I have never been certain that the criticisms are accurate, but I decided that an improvement in the mere style of the Rules did not justify much uncertainty. For this reason, I joined other critics in opposing the enactment of the Restyling Amendments in an essay titled The Restyling of the Federal Rules of Civil Procedure: A Solution in Search of a Problem. Now that the Restyling Amendments are effective, however, I am rooting for their success and urging other critics to do the same. Whether the Restyling Amendments should have been adopted in the first place is now moot. The issue now is what we can do to maximize the chance that the Restyled Rules will succeed, despite their faults. This year alone, the Restyled Rules will affect the rights and obligations of hundreds of thousands of litigants. We must hope and work to ensure that the Rules function as their supporters believed they would rather

than as critics like me feared they would. This article is a call to optimism and action. It calls for critics to be optimistic that the Rules will not be as problematic as we feared and provides the rationale for that optimism. This article also calls for action on the part of the Advisory Committee to eliminate the known and undesirable substantive changes resulting from the Restyling. This critical support and Advisory Committee action will help to ensure that the Federal Rules of Civil Procedure are a model of both clarity and procedure.

I. INTRODUCTION

On December 1, 2007, the words of nearly every Federal Rule of Civil Procedure changed when the so-called "Restyling Amendments" took effect.[1] These amendments were the product of a decade and a half of work by members of the Standing Committee on Rules of Practice and Procedure, the Style Subcommittee, the Advisory Committee on Civil Rules, and their style consultants.[2] The goal of these Restylists was to change the words of nearly all the Rules in order to improve their style and clarity without changing the meaning of any one of them. This goal raised several questions in my mind, and in the minds of many others whose opinions I have come to respect. Can one change the language of the law without changing its meaning? Do stylistic improvements justify the cost of transitioning from one set of rules to another? What important

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[1] Order of the Supreme Court of the United States, April 30, 2007, *available at* www.uscourts.gov/rules/supct1106/Trans-Orders.pdf (providing December 1, 2007, as effective date). *See also* Letters from John G. Roberts, Chief Justice, United States Supreme Court, to Honorable Dick Cheney, President, United States Senate, and Honorable Nancy Pelosi, Speaker of the House of Representatives (April 30, 2007) *available at* www.uscourts.gov/rules/supct1106/Trans-Orders.pdf. Transmittal of the amendments to Congress by May 1, 2007 permits an effective date of December 1, 2007 pursuant to the Rules Enabling Act, 28 U.S.C. § 2074(a) (2000).

[2] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S.,, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 3 (2006), *available at* http://www.uscourts.gov/rules/Appendix_D.pdf (reporting the 1992 start date of the Style Project and the major participants in it).

reforms were sacrificed at the altar of the Style Project during the fifteen years it dominated the time of the Rules Committees?

I was not certain of the answers to these questions, but, in the end, I decided that an improvement in the style of the Rules did not justify the uncertainty. For this reason, I opposed the enactment of the Restyling Amendments.[3] If I could turn the clock back to a time before their December 1, 2007, effective date, I would oppose them all over again. But now, for better or worse, the Restyled Rules govern procedure in all civil actions in the United States District Courts. The clock striking midnight on December 1, 2007, mooted the issue of whether the Restyled Rules should be adopted. Now the issue is what we can do to maximize the chance that the Restyled Rules will succeed. This year alone, the Restyled Rules will affect the rights and obligations of hundreds of thousands of litigants.[4] We must hope and work to ensure that the rules function as their supporters believed they would rather than as critics like me feared they would. We have to root for the Restyled Rules now.

My work on this article has tempered my own concerns about the effects of the Restyling Amendments. As much as anything else, this article may reveal the evolution of one observer's thinking on the subject—a journey from diametric opposition to cautious, grudging optimism that, with some changes by the Advisory Committee, the Restyled Rules may not be the disaster I feared. My optimism comes from the fact that the Restyled Rules *are* clearer than the old rules. In most cases, the Restyled Rules undoubtedly express the same meaning as the old rules but do so in shorter, crisper sentences that avoid antiquated legalese and near impenetrable syntax. I am grudging in my optimism because I believe the Restylists should

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[3] Jeremy Counseller & Rory Ryan, *The Restyling of the Federal Rules of Civil Procedure: A Solution in Search of a Problem*, WASH L. REV. SLIP OPINIONS (2007) *available at* http://lawreview.wustl.edu/slip-opinions/the-restyling-of-the-federal-rules-of-civil-procedure-a-solution-in-search-of-a-problem/.

[4] FEDERAL JUDICIAL CASELOAD STATISTICS, ADMIN. OFFICE OF THE U.S. COURTS Table C, *available at* http://www.uscourts.gov/caseload2007/tables/C00Mar07.pdf. This projection of the magnitude of the Restyled Rules' impact in 2008 is based upon recent federal court civil caseload statistics. In 2007, 278,272 civil cases were commenced in the federal district courts. This was a forteen-percent increase over 2006. *Id.*

not have made top-to-bottom changes to the Federal Rules under the label of a "Style Project." Such a label discourages and misdirects public comment because, after all, no substantive changes will result, or so all are told, and, therefore, any comments should be directed to the new, improved *style* of the rules.

Optimism aside, the simple truth is that the former Federal Rules of Civil Procedure are past the point of no return. Criticisms of the Restyling Amendments that were valid before their effective date no longer are. Much of the transition cost has already been incurred and, if the Restyling delayed more important reform, nothing can change that fact now. Indeed, returning to the old rules would carry its own transition costs and only further delay other reform. In other words, we have to make the best of the Restyled Rules for many of the same reasons the Restylists should not have created them in the first place.

This article aspires to set forth a rationale for supporting the Restyled Rules that is persuasive even to critics and to describe what the Advisory Committee still has left to do in order to maximize their chance of success. At a minimum, however, it is hoped that this article smoothes the transition from the former Rules to the Restyled Rules by serving as an educational resource to the Rules' users. Part II of this article discusses the origins and evolution of the Style Project and concludes that, because of the quality of the Restylists and their effort and because of the quality of the criticism from the Burbank-Joseph Group, even critics will find rooting for the Restyled Rules palatable. Part III discusses the fact that rooting for the Rules is necessary because, at this point, we neither can nor should return to the former Rules. Part IV calls for action on the part of the Advisory Committee to maximize the chances of the Restyled Rules' success. The Advisory Committee must repair the clear and undesirable substantive changes it inadvertently made to the discovery rules and must continue to resist any call for a rule of construction to prevent the Restyling Amendments from superseding other laws.

II. EVEN A CRITIC CAN ROOT FOR THE RESTYLED RULES

Rooting for the Restyled Rules is palatable, even to a critic. The stature of the Restylists and the effort they put into the project command respect and provide hope that the negative effects of the Restyling Amendments will be limited. Critics should also find it easier to root for the Restyled Rules because a group of critics had a significant and positive impact on the final version of the Restyled Rules.

A. The Restylists and Their Effort Command Respect

The Restyled Rules are the product of the extraordinarily hard work of some of the leading procedural experts and practitioners in the country. The reputations and effort of the Restylists gives even the staunchest of critics pause and should give everyone a reason to root for the success of the amendments.

To achieve their goal of improving only the style of the rules, the Restylists had to change the wording of all the rules without changing the meaning of even one. A mere glimpse of the project's magnitude makes one wonder how any single person, much less multiple committees with rotating memberships, could be convinced to embark on so difficult and daunting, if not impossible, a task. But, in defense of the Restylists, it was no mere mortal who convinced them to begin their Herculean challenge. The reason our federal rules are restyled is because the late Professor Charles Alan Wright thought they needed to be.[5]

Although the project would not have succeeded without

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[5] JUDICIAL CONF. COMM. ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, at 2 (Sept. 1991), *available at* http://www.uscourts.gov/rules/Reports/ST09-1991.pdf (reporting creation of Style Subcommittee); Judge Robert E. Keeton, *Preface* to BRYAN A. GARNER, ADMIN. OFFICE OF THE U.S. COURTS, GUIDELINES FOR DRAFTING AND EDITING COURT RULES, at i, iii (1996), *available at* http://www.uscourts.gov/rules/guide.pdf (noting Professor Wright's acceptance of chairmanship of Style Subcommittee). *See also* ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, *supra* note 2 ("Judge Keeton, with the late Professor Charles Alan Wright, persuaded the rules committees to undertake the work. . . ").

Professor Wright's support, the project was actually the brain child of another man, Judge Robert E. Keeton.[6] The restyling project began shortly after Judge Keeton became Chair of the Standing Committee on Rules of Practice and Procedure in the fall of 1990.[7] Judge Keeton believed that significant time and talent was being wasted making and interpreting the various sets of federal rules.[8] Judge Keeton lamented the fact that, in 1990, there were five sets of Federal Rules and five Rules Committees of the Judicial Conference and that "[e]ach committee had its own set of consultants and drafters and its own set of stylistic preferences."[9] The result, according to Judge Keeton, was "five sets of rules that sometimes said almost the same thing, but in different ways and without being clear about whether they meant the same thing."[10]

Initially, the idea of combining all the sets of federal rules into a single set known as the Federal Rules of Practice and Procedure "tempted" Judge Keeton.[11] He saw great benefit in integrating both the style and content of the various sets of federal rules. Recognizing that "substantive integration may prove to be an elusive ideal," Judge Keeton settled on what he called "stylistic integration."[12] Judge Keeton believed that each set of rules should share one drafting style.[13]

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[6] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, *supra* note 2 ("The Style Projects began in 1992 with Judge Robert E. Keeton and his vision of revising all the rules to make them clearer and easier to understand.").

[7] JUDICIAL CONF. COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF THE MEETING OF JULY 12 AND 13, 1990, at 22, *available at* http://www.uscourts.gov/rules/ST07-1990-min.pdf (noting end of Judge Weis's tenure as chairman); JUDICIAL CONF. COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF THE MEETING OF FEBRUARY 4, 1991, at 1 (listing Judge Keeton as Chair), *available at* http://www.uscourts.gov/rules/ST02-1991-min.pdf; Keeton, *supra* note 5, at ii.

[8] Keeton, *supra* note 5, at ii.

[9] *Id.* at i.

[10] *Id.* at i-ii.

[11] *Id.* at ii ("Some resources might be directed toward a long-term aim of combining all the separate sets of rules into one set, integrated in both style and content: the Federal Rules of Practice and Procedure.").

[12] *Id.*; JUDICIAL CONF. COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 5 (reporting creation of a Style Subcommittee).

[13] Keeton, *supra* note 5, at ii ("Having a consistent drafting style in all the rules carries major benefits. Foremost among these, of course, is that clear expression

In 1991, the Standing Committee created a Style Subcommittee, and Judge Keeton appointed the late Professor Charles Alan Wright, then a member of the Standing Committee, to serve as chair of the Style Subcommittee.[14] In 1993, five years before any of the Restyled Rules became effective, Professor Wright resigned as Chair of the Style Subcommittee to assume the presidency of the American Law Institute.[15]

Though short, Professor Wright's tenure was essential to the completion of the Style Project. Professor Wright, along with Judge Keeton, was the "moving force" behind the Style Project, according to Professor Carol Ann T. Mooney, a proponent of and participant in the restyling effort.[16] Professor Wright's chairmanship of the Style Subcommittee lent (and continues to lend) a great deal of credibility to the restyling effort. Judge Keeton was probably putting it mildly when he said that Professor Wright's writings "rank with the best in legal literature."[17] Professor Wright was also indispensable in helping Judge Keeton persuade the advisory committees of the need for a comprehensive restyling.[18] Initially, the Style Subcommittee worked on amendments only, but, in the words of

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promotes clear thought. Variation, elegant or not, impairs clarity.").

[14] JUDICIAL CONF. COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 5: Keeton, *supra* note 5, at iii.

[15] Keeton, *supra* note 5, at iii; JUDICIAL CONF. COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF THE MEETING OF JUNE 17-19, 1993, at 2, *available at* http://www.uscourts.gov/rules/Minutes/june1993.pdf ("Judge Keeton also noted that Professor Wright had become president of the ALI and had asked to be relieved of his duties as chair of the Style Subcommittee.").

[16] Carol Ann T. Mooney, *Simplification of the Appellate Rules of Civil Procedure*, 105 DICK. L. REV. 237, 237 (2001) ("The first thing I need to do is thank Judge Keeton, who along with Professor Charles Alan Wright, was the moving force behind the style project for the Federal Rules.").

[17] Keeton, *supra* note 5, at iii ("Because of the importance of this new undertaking, we needed a leader with a demonstrated sense of good writing style. Fortunately, Charles Alan Wright, a dedicated stylist whose writings rank with the best in legal literature, was then serving on the Standing Committee. He accepted the appointment to Chair the Style Subcommittee.").

[18] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, *supra* note 2 ("Judge Keeton, with the late Professor Charles Alan Wright, persuaded the rules committees to undertake the work . . . ").

Judge Keeton, "the value of the work was so readily apparent that the Style Subcommittee was asked to produce fully restyled drafts of two sets of rules—the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure."[19]

Professor Wright was, in large part, the reason the scope of the Style Project expanded to include entire sets of rules as well as new amendments. The Style Subcommittee recognized early on that the restyling effort would be "arduous" and "time-consuming." None other than a titan like Charles Alan Wright could have persuaded the rules committees to engage in such an effort and pursue it for more than fifteen years. Without his early involvement, the restyling effort may have died an early, quiet death.

While it may be easy to understand how figures like Judge Keeton and Professor Wright could persuade the various committees to restyle the federal rules, it is more difficult to determine precisely what motivated these two men to encourage a restyling in the first place. Both men wanted clearer rules, but neither man appears to have publicly articulated a problem with the rules that restyling would fix. Although Judge Keeton was concerned that the many different committees were repeating effort, he must have known that style integration alone would not completely eliminate this problem. Indeed, before the Style Project neither man published any work identifying problems fixable by restyling or calling for a "restyling" or "style project" of any kind. If Judge Keeton and Professor Wright had motivations for restyling more specific than a desire for clearer rules, they did not share them in any formal way beyond the bounds of the rules committees.

Judge Keeton and Professor Wright believed that, while a restyling might solve some then-existing problems with the federal rules, such as making the rulemaking process more efficient and interpretation of the rules easier, the primary reason for restyling the rules was to prevent problems that would inevitably arise as the language became ever more antiquated and separated from actual practice. In short, the

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[19] Keeton, *supra* note 5, at iii.

Style Project would head off problems at the pass. One of the Advisory Committee's reports to the Standing Committee on Rules of Practice and Procedure reflects the prophylactic nature of the restyling when it states: "Had we not done this work, the rules would have become progressively more difficult to understand and use and more removed from practice."[20]

While Judge Keeton's and Professor Wright's motivations are difficult to discern, the goal of the Style Project is clear. The Advisory Committee itself expressly stated the Style Project's goal in its Report to the Standing Committee on Practice and Procedure as "clarifying and simplifying the rules, making them easier to use and understand, without changing substantive meaning."[21] Professor Edward H. Cooper[22] succinctly stated the goal of restyling in the title of his article on the subject—"Clarity Without Change."[23] Though there is significant scholarship arguing that "clarity without change" is not achievable, even critics agree that improved clarity is a commendable goal.[24]

The "clarity without change" mantra encapsulates the issue with respect to the Restyled Rules going forward. Because the Restylists have achieved improved clarity but have inadvertently made changes to the law of procedure, the task now is to preserve the benefits of the restyling (improved clarity) while recognizing the need to repair the damage it caused (substantive changes).

While Judge Keeton and Professor Wright were the "moving force" behind the Style Project, the people most

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[20] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, *supra* note 2, at 5.

[21] *Id.* at 2.

[22] Professor Cooper is a Professor at the University of Michigan Law School, the Reporter for the Advisory Committee on the Federal Rules of Civil Procedure, and played a central role in the restyling project. *Id.* at 4 ("Professor Cooper was the central point for decisions, over and over and over again and, with Professor Rowe and Professor Marcus, provided the research, expertise, and judgment that gave us a reliable basis for many drafting decisions.").

[23] Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761 (2004).

[24] *See, e.g.*, Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 156 (2006) ("As have other procedural reformers before them, the restylists seek to make procedural rules simpler, clearer, more accessible, and easier to understand. I certainly share these goals."); Counseller & Ryan, *supra* note 3.

responsible for developing and applying the project's drafting principles were Bryan A. Garner and Joseph Kimble. At the time Judge Keeton appointed Professor Wright to be the chair of the new Style Subcommittee, Bryan A. Garner was already a prominent legal writing expert. He was the editor of the *Scribes Journal of Legal Writing*[25] and had published the first edition of *A Dictionary of Modern Legal Usage*.[26] In fact, the first members of the Style Subcommittee found themselves consulting Garner's publications on legal writing in the early days of the restyling effort.[27] The Subcommittee also recognized early on how time-consuming and difficult a task restyling was going to be.[28] When the Subcommittee decided it needed a style consultant to lend expertise and help with the workload, Garner was the obvious choice.

The Subcommittee wanted its restyling to improve "clarity, brevity, and readability."[29] Once Garner was hired, the Subcommittee outlined some specific guidelines to achieve those goals.[30] The Subcommittee asked Garner to create a restyled draft of both the Appellate and Civil Rules, employing the guidelines the Subcommittee had agreed upon.[31] The Style Subcommittee reviewed Garner's drafts and then forwarded them to the Civil Rules Committees for approval.[32]

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[25] *See* Bryan A. Garner, *From the Editor*, 2 SCRIBES J. LEGAL WRITING v (1991) ("Probably the last thing American law needs right now is another typical law journal. That was my view even as I agreed to edit last year's inaugural issue of the *SJLW*.").

[26] BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE (1987).

[27] Keeton, *supra* note 5, at iii ("Not long after the Subcommittee began its work, we realized just how time-consuming—and arduous—the detailed work on the rules would be. We saw the need for a style consultant . . . we were able to engage Bryan A. Garner, whose books on legal writing the members of the Style Subcommittee were frequently consulting.").

[28] *Id.*

[29] George C. Pratt, *Introduction* to BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES, at v (1996), *available at* http://www.uscourts.gov/rules/guide.pdf.

[30] *Id.* ("With the aid of our consultant, Bryan A. Garner, we initially agreed on and outlined some basic goals, and then more specific guides for achieving those goals.").

[31] *Id.* at vi; ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, *supra* note 2, at 3-4.

[32] Pratt, *supra* note 29, at vi.

At first, the guidelines Garner and the Subcommittee used to restyle the rules were not set out in any formal way, instead existing only in the notes and minds of the committee members.[33] The Subcommittee came to believe that the drafting guidelines they had agreed upon and employed in the drafting of the restyled Appellate and Civil Rules were "valuable conventions" and "needed to be preserved and collected in a coherent, organized manual."[34] The Style Subcommittee asked Garner to create this "coherent, organized manual," and the result was Garner's *Guidelines for Drafting and Editing Court Rules*.[35]

The influence of Garner's *Guidelines* on the Restyled Rules of Civil Procedure can hardly be overstated. The Subcommittee used *Guidelines* as a "handy reference" for its future work and *Guidelines* has become "the accepted style for federal rules."[36] The Advisory Committee note following Rule 1 now states that *Guidelines*, along with Garner's *Dictionary of Modern Legal Usage*, provided "[g]uidance in drafting, usage, and style."[37] Judge George C. Pratt, former Chair of the Style Subcommittee, said that *Guidelines* will "help us as we continue working through demanding, exacting revisions of all of the rules" and it "will provide continuing benefit to future members of the rules committees and ultimately, through the clarity and readability that these Guidelines can produce, to the legal profession as a whole."[38]

The Restyled Rules are the product of both long-established, familiar conventions and principles that Garner and the Style Subcommittee developed as they worked to restyle the rules. According to Garner, *Guidelines* is a "'blackletter' statement of principles,[39] followed by illustrations."[40] Garner

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[33] *See id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] FED. R. CIV. P. 1 Advisory Committee's note (2007 Amendment).

[38] Pratt, *supra* note 29, at vii.

[39] In *Guidelines*, Garner did not provide the rationales behind the drafting principles. *But cf.* BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (1991).

described some of the principles as "fairly standard" while others, such as the principles on placing conditions and exceptions, are "entirely fresh."[41] Garner acknowledged that the "fresh" guidelines "have no precedent in the literature on legal drafting," instead were developed entirely as a result of the restyling effort.[42]

Guidelines first sets out what are called "[b]asic [p]rinciples."[43] The basic principles are the goals the other guidelines are meant to achieve. One can hardly quarrel with basic writing principles like "[b]e clear," "[m]ake the draft readable," and "[b]e as brief as clarity and readability permit."[44] *Guidelines* also sets out general conventions to help achieve the basic principles. For example, *Guidelines* calls for drafting the rules in the present tense, in the active voice, and in the singular unless the sense is undeniably plural.[45]

The general conventions also address a number of syntactical issues, including where to place conditions, exceptions, interruptive phrases, and modifiers.[46] *Guidelines* calls for the placement of these kinds of phrases at the beginning or end of a sentence.[47] *Guidelines* also encourages minimizing "of-phrases" by replacing them with possessives and adjectives.[48] For example, *Guidelines* tells us that a rule should read "an appellant's failure" instead of "failure of an appellant" and "violation of a federal statue" instead of "violation of a statute of the United States."[49] *Guidelines* also demands short sentences—an average of fewer than twenty-five words per

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[40] Bryan A. Garner, *Author's Note* to BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES, at ix (1996), *available at* http://www.uscourts.gov/rules/guide.pdf.

[41] *Id.*

[42] *Id.*

[43] Bryan A. Garner, GUIDELINES FOR DRAFTING AND EDITING COURT RULES 1 (1996), *available at* http://www.uscourts.gov/rules/guide.pdf.

[44] *Id.*

[45] *Id.* at 3-4.

[46] *Id.* at 5-12.

[47] *Id.*

[48] *Id.* at 11.

[49] *Id.* at 11-12.

sentence and never more than thirty.[50]

Guidelines also demands adherence to certain organizational principles. These principles include:

- Put the broadly applicable before the narrowly applicable
- Put the general before the specific
- Put more important items before less important
- Put rules before exceptions
- Put contemplated events in chronological order[51]

Applying these organizational principles increased the number of subdivisions in the rules. For example, the former Rule 4(a) was a single paragraph setting forth the contents of a summons.[52] The restyled Rule 4(a) is now subdivided into parts (1) and (2).[53] Rule 4(a)(1) is further subdivided into parts (A) through (G).[54]

Kimble tells us that the formatting changes necessitated by adherence to these organizational principles (or "Structure principles as Garner calls them) are likely to be the first thing a lawyer notices when reviewing the Restyled Rules.[55] The Rules also use hanging or "cascading" subparts so that "a rule's hierarchy is made graphic."[56] This means that the provisions are indented below the ones to which they are subordinate. In other words, as one of my first-year law students said, "The rules are outlined for you."

Kimble encourages us to compare the former Rule 14(a) with the Restyled Rule.[57] The Rule 14 comparison Kimble urges reveals convincingly the benefits of the Restylists' formatting conventions. The old Rule 14(a) was a single paragraph of nearly 400 words that contained numerous, distinct joinder

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[50] *Id.* at 13.

[51] *Id.* at 17.

[52] FED. R. CIV. P. 4(a), 28 U.S.C.A. app. (West 1992 & Supp 2007) (amended 2007).

[53] FED. R. CIV. P. 4(a).

[54] *Id.*

[55] Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part 1)*, 84 MICH. B.J., Sept. 2005, at 56, 57.

[56] *Id.*

[57] *Id.*

rules.[58] The Restylists subdivided Rule 14(a) into a vertical list numbered one through six and added subtitles to each numbered item in the list, making it easier to understand the various functions of the rules.

The Restylists may, however, be gilding the Lilly with some of their formatting changes. For example, old Rule 4(a) was a single paragraph containing fewer than 100 words setting out the requirements for the form of a summons.[59] The restyled Rule 4(a) has been subdivided into numerous subparts, some subordinate to another. Post restyling, the citation for the proposition that a summons must bear the court's seal is FED. R. CIV. P. 4(a)(1)(G), as opposed to FED. R. CIV. P. 4(a) before the restyling. As applied to a provision like Rule 4(a), the Restylists' formatting convention does little if anything to improve clarity and may in fact increase citation errors.

While Garner established the drafting guidelines and penned the initial draft of the civil rules, Joseph Kimble served as the primary wordsmith as the Restyled Rules went through draft after draft. Kimble's challenge was to apply Garner's general drafting principles to answer the "myriad style questions that arose during the project."[60] The Advisory Committee created an appendix setting out more than fifty recurring style questions and how it decided to resolve them.[61] The resolution of these issues greatly impacted the text of the Restyled Rules. "Allege" and "allegation" replace "aver" and "averment," "order" replaces "direct," and "crossclaim" replaces "cross-claim."

Kimble and the Advisory Committee also worked to eliminate what Kimble called "intensifiers."[62] According to Kimble, intensifiers are expressions that "might seem to add

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[58] FED. R. CIV. P. 14(a), 28 U.S.C.A. app. (1992 & Supp. 2007) (amended 2007).

[59] FED. R. CIV. P. 4(a), 28 U.S.C.A. app. (1992 & Supp. 2007) (amended 2007).

[60] Kimble, *supra* note 55, at 56.

[61] PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE, Appendix A (2005), available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf.

[62] Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part 2)*, 84 MICH. B.J., Oct. 2005, at 52, 52 ("Another difficult challenge was presented by what the Advisory Committee came to call 'intensifiers'.").

emphasis" but should be avoided because: 1) they state the obvious; 2) have no practical value; or 3) create negative implications for other rules.[63] Kimble provides the following examples of why intensifiers should be eliminated.[64]

- In *the court may, in its discretion* the discretion clause is an intensifier because may means "has the discretion to."
- In *if the court deems it advisable, the court may* the if-clause is an intensifier because the court would not be doing something inadvisable.
- In *reasonable written notice* the word reasonable implies that in every other rule that requires notice the notice need not be reasonable.

Kimble and the other Restylists were sensitive to the fact that some phrases are so familiar as to be unalterable, even if the phrases might otherwise be in need of restyling. Kimble calls such phrases "sacred phrases."[65] Examples of such phrases are: "failure to state a claim upon which relief can be granted," "in equity and good conscience," and "no genuine issue as to any material fact."[66]

For the most part, the Restylists simply applied widely-accepted principles of good drafting. Consequently, the rules are clearer and more readable. No critic claims that the Restyled Rules are less clear or less readable than they were before the Style Project. Instead, much of the criticism of the restyling centered on the notion that no group, no matter how hard they try, can avoid making substantive changes while making top-to-bottom textual changes to the rules.

Despite the criticism, the Restylists believed they could change the words without changing the meanings of the Rules and went to great lengths to do so. They implemented a process for making and reviewing changes that involved procedure experts, style experts, and double and triple-checking for substantive changes. First, the Advisory Committee's Reporter

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[63] *Id.*

[64] *Id.*

[65] *Id.* at 55.

[66] *Id.*

reviewed Garner's original draft and highlighted possible substantive changes.[67] The style consultants revised the draft in light of the possible substantive changes.[68] This second draft then went to the Style Subcommittee, which produced a third draft.[69] The Advisory Committee formed two subcommittees, each subcommittee reviewing one half of the rules in the third draft.[70] If a "significant minority" of a subcommittee believed that certain wording worked a substantive change, the language was not approved.[71] The Subcommittees produced a fourth draft, from which the Advisory Committee produced a fifth draft.[72] Additional changes were made in response to suggestions from the Standing Committee on Rules of Practice and Procedure.[73]

The Restylists are confident that their precautions allowed them to change the words of nearly all the rules without changing the meaning of even one. The Advisory Committee believes that the transition from the old to the Restyled Rules will be seamless and predicted that within a few years no one would remember that there had been a style project.[74] Kimble proclaimed, "Everything that applied before this style project applies after the project."[75]

Despite this confidence, the Restylists took the precaution of adding the following language to every Committee Note—"These changes are intended to be stylistic only."[76] Edward Cooper describes the need for the note.

> One of the central difficulties of the style enterprise is that new

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[67] Keeton, *supra* note 5, at 3; Kimble, *supra* note 55, at 56.

[68] Kimble, *supra* note 55, at 56.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, *supra* note 2, at 5. ("The irony is that if we did our work well—and we have—the new rules will seamlessly take the place of the old.").

[75] Kimble, *supra* note 55, at 56.

[76] *Id.*; *See, e.g.*, FED. R. CIV. P. 1 Advisory Committee's note.

> words are capable of bearing new meanings. Advocates will seize on every nuance and attempt to wring advantage from it . . . We cannot effectively prevent that process, and we may not wish to. But the committee notes are a vehicle for attempting to restrain these impulses.[77]

The purpose of the note is not so much to prevent substantive change as to discourage frivolous arguments for it.On the other hand, if the new language does in fact change meaning, one wonders what good the note will do, particularly to those textualist judges for whom the Restylists' intent and the Restyling Amendments' purpose carries little if any weight.[78] A change in language can change meaning, irrespective of what the Committee intended.

Perhaps it is not even possible to change language without changing meaning.[79] The Restylists have not managed to avoid substantive changes (as discussed below in Section II-B). It is the as-yet unidentified substantive changes that are the most worrisome. As one prominent critic said after identifying and reporting substantive changes to the Advisory Committee, "If the Advisory Committee's distinguished members, advisors, consultants, and reporter missed things that I caught, I have to believe that others will catch things that we all missed."[80] Obviously, nothing can be done with undiscovered substantive changes, but the Restylists' efforts to avoid substantive changes, not to mention the substantial contribution of the Burbank-Joseph Group, provide at least some hope that such changes are few and easily fixed.

On the whole, the restyled federal rules are clearer and more readable than their predecessors. As someone who has already presented the Restyled Rules to a group of first-year law students, I can tell you that students overwhelmingly prefer the Restyled Rules. One student's comment is representative:

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[77] Cooper, *supra* note 23, at 1783.

[78] Hartnett, *supra* note 24, at 168-69 (pointing out that by omitting a rule of construction the Advisory Committee "give[s] ammunition to *both* those who rely on plain text *and* those who rely on the lawmakers' purpose.").

[79] *Id.* at 165.

[80] *Id.* at 164-65.

"they're easier to read and they're already outlined for us."

It should come as no surprise that the restyled federal rules are clearer and easier to read. After all, they are the result of the application of accepted principles of good writing—short sentences, no redundancy, avoid the passive voice, etc. Consider the example Professor Kimble provides comparing Rule 8(e)(2) with the restyled rule.

> **Rule 8(e)(2):** When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.
>
> **Restyled:** If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.[81]

No one has complained that the restyling of this particular provision of Rule 8 has caused a substantive change, and it is hard to argue that the old version is clearer than the new, restyled provision.[82] This example is not an isolated one. The Restyled Rules are consistently more readable than the old rules. Even critics of the rules were impressed with the readability of the Restyled Rules.[83] Professor Hartnett opposed the Restyled Rules, but even he was impressed with their clarity and readability.[84] Without question, the Restyled Rules give us clearer words, but there is a lingering concern that they have at

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[81] Kimble, *supra* note 55, at 57.

[82] The restyled version of this provision, however, is now set out in Rule 8(d)(2) rather than Rule 8(e)(2), and some critics have complained that the Restyled Rules renumber certain provisions and that this renumbering will cause confusion and citation errors. *See, e.g.*, Jeffrey S. Parker, *Postponing the 2007 "Restyling" Amendments to the Federal Rules of Civil Procedure*, George Mason University Law and Economics Research Paper Series 6 n.10 (2007), available at http://ssrn.com/abstract_id=1016221 (citing examples of authors of law review articles having to redirect readers to the "old" law in the new "clarified" version of the rule, including Phillip A. Pucillo, *Rescuing Rule 3(c) from the 800-Pound Gorilla: The Case for a No-Nonsense Approach to Defective Notices of Appeal*, 59 OKLA. L.REV. 271 (2006)).

[83] Hartnett, *supra* note 24, at 157. *See also* Stephen B. Burbank & Gregory P. Joseph, MEMORANDUM TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 5 (Oct. 24, 2005) (noting that a minority of the Group favored a continuation of the project and noting broad support for the goals of the restyling).

[84] Hartnett, *supra* note 24, at 157.

least in some instances distorted meaning.

B. The Burbank-Joseph Group Improved the Restyled Rules

The purpose of the Burbank-Joseph Group ("the Group") was to determine whether the Restylists had achieved their goal of improving clarity without changing meaning. Aside from the Restylists themselves, no group had more influence on the Restyled Rules than the Group. The Group formed as a result of Edward Cooper's call for the Bench and Bar to "examine the restyled rules with punctilious care."[85] Realizing, as Cooper himself had said, that no single person could effectively review all of the rules, Professor Stephen Burbank and Greg Joseph formed a distinguished group of eleven law professors and ten practitioners to review the Restyled Rules.[86] Burbank and Joseph chose the members of the group for "their demonstrated knowledge and experience, intelligence and common sense, not of any knowledge as to their attitudes or likely attitudes toward the restyling effort."[87] Few could quibble with the quality of the membership of the Group.[88]

The Group did not set out to undermine or support the restyling effort.[89] Burbank and Joseph believed that "informed comment" on the Restyling Amendments was critical, but they also believed that few individuals would be able to make the effort necessary to provide meaningful comment on the rules.[90] The formation of the Group allowed for a sharing of the substantial workload necessary to achieve the "informed comment" Burbank and Joseph felt was critical. The Group divided the Restyled Rules into ten groups and assigned teams

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[85] *Id.* at 156-57 (quoting Cooper, *supra* note 23, at 1785).

[86] *Id.* at 157; Burbank & Joseph, *supra* note 83, at 1.

[87] Burbank & Joseph, *supra* note 83, at 1.

[88] The academician members of the Group were Professors Stephen Burbank, Janet Alexander, Kevin Clermont, Edward Hartnett, Geoffrey Hazard, Arthur Miller, James Pfander, David Shapiro, Linda Silberman, Catherine Struve, and Tobias Wolff. *Id.* at 7. The practitioners were Gregory P. Joseph, Scott J. Atlas, Allen D. Black, David R. Buchanan, Robert L. Byman, Robert Ellis, Francis H. Fox, William Hangley, Loren Kieve, and Patricia Lee Refo. *Id.*

[89] *Id.* at 1.

[90] *Id.*

of two to review each group of rules.[91]

The Group identified three categories of problems with the Restyling Amendments. In the first category are those amendments that would "unquestionably" change the meaning of a rule.[92] In the second category are those amendments that give rise to a "reasonable argument" that meaning would be changed.[93] The third category consists of those amendments that were "hard to read or would be hard to cite."[94]

In the fall of 2005, the Group submitted more than 200 pages of comments (including a side-by-side comparison of the Restyled and Former Rules) to the Standing Committee.[95] The Group identified more than 130 amendments that it believed fell within one of the categories.[96] Where the Group identified a problem, it suggested a solution—usually either an alternate language change or reversion back to the original word or phrase.[97]

As for what the Group referred to as the "big picture question"—whether a restyling of the federal rules should occur at all—a minority of the group believed the restyling should continue while the majority was opposed to a continuation of the project.[98] The minority supported a continuation of the restyling effort, despite a belief that some unintended changes in meaning were inevitable.[99] In the view of the minority, the Restyled Rules were more accessible, particularly to the less experienced practitioner.[100]

Most of the participants in the Group were "either mildly or

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[91] *Id.*

[92] *Id.* at 2.

[93] *Id.*

[94] *Id.*

[95] *See generally* MEMORANDUM FROM JOHN K. RABIEJ, CHIEF, RULES COMMITTEE SUPPORT OFFICE, TO THE CIVIL RULES COMMITTEE (Oct. 15, 2005) [hereinafter COMMENTS ON STYLE REVISION], *available at* http://www.uscourts.gov/rules/Agenda%20Books/Civil/CV2005-11.pdf.

[96] *Id.*

[97] *Id.*

[98] Burbank & Joseph, *supra* note 83, at 5-6.

[99] *Id.* at 6.

[100] *Id.*

strongly negative."[101] One member's description of his initial impressions may represent the majority:

> On my first few passes, making the [s]ide-by-side reading and comparison between the existing rule and the proposed restyled rule that Professor Cooper had encouraged, I was impressed . . . Yet as I dug further, moving beyond comparison of two texts to an examination of judicial interpretations of the current rule and asking whether the restyled rule might change that interpretation, I became more and more concerned. The more I looked, the less sanguine I became. By the time I concluded my review, I decided that I could not support the adoption of the Restyled Rules.[102]

The majority expressed concerns that any benefits of restyling were outweighed by the uncertainty regarding a change in meaning as well as what the Group referred to as "transaction costs," such as the need to learn the new rules and pay for the new treatises.[103] The Group majority also expressed concern that the restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century."[104] The Group majority did not believe that the Bar would tolerate having to relearn the rules more than once in a generation.[105]

The Group's criticisms did not fall entirely on deaf ears. The Advisory Committee described the Group's study as "thorough" and expressed its gratitude for the Group's work.[106] The Advisory Committee also decided to conduct the hearing in a roundtable discussion format instead of the typical witness-testimony format—a format more conducive to a give-and-take

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[101] *Id.*

[102] Hartnett, *supra* note 24, at 157.

[103] Burbank & Joseph, *supra* note 83, at 6.

[104] *Id.*

[105] *Id.*

[106] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, 109TH CONG., REPORT OF THE CIVIL RULES ADVISORY COMM. 2 (Dec. 2005) [hereinafter DECEMBER 2005 REPORT], *available at* http://www.uscourts.gov/rules/Reports/CV12-2005.pdf.

discussion about the changes the Group felt were necessary.[107]

In November of 2005, the Advisory Committee held the roundtable discussion of the Group's findings and comments with Burbank and Joseph.[108] As a result of the meeting, the Advisory Committee made changes to the draft of the Restyled Rules presented for public comment. The Advisory Committee added Rule 86(b) to address the Group's concern that the Restyled Rules would supersede federal statutes.[109] The Advisory Committee also made changes in response to the Group's rule-by-rule comments on the restyling. As to many of the more than 130 amendments the Group identified as problematic, the Advisory Committee either made the change the Group suggested or made a different change to solve the problem. In dozens of other cases, the Advisory Committee chose not to make any change in response to the Group's comments.

Despite the Advisory Committee's responsiveness to the Group's comments, the Advisory Committee's actions did not convince all members of the Group to support the restyling effort.[110] The serious problems the Group found and brought to the attention of the Advisory Committee may have been just the tip of the iceberg. A common view amongst the members of the Group was that despite the care they took in their work they could not possibly have identified all the problems with the rules.[111] The Group had identified what it believed to be serious

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[107] COMM. ON RULES OF PRACTICE AND PROCEDURE, 109TH CONG., MINUTES FROM MID-YEAR MEETING 14 (Jan. 2006) [hereinafter JANUARY 2006 MEETING], *available at* http://www.uscourts.gov/rules/Minutes/ST01-2006.pdf.

[108] DECEMBER 2005 REPORT, *supra* note 106, at 14; JANUARY 2006 MEETING, *supra* note 107, at 2.

[109] CIVIL RULES ADVISORY COMM., 109TH CONG., MINUTES FROM MAY 2006 MEETING 15 (May 2006) [hereinafter MAY 2006 MEETING], *available at* http://www.uscourts.gov/rules/Minutes/CV05-2006-min.pdf (acknowledging that public comment on the style project included "concern that the supersession effects of the Civil Rules would be expanded by promulgating the entire body of the Civil Rules to take effect on December 1, 2007").

[110] Hartnett, *supra* note 24, at 156.

[111] *Id.* at 164-65; *see also* Burbank & Joseph, supra note 83, at 6 (noting that a "commonly expressed view" amongst the members of the Group opposing continuation of the project was that regardless of the care the Restylists have taken, there are likely to

problems with the Restyled Rules and believed that, given the problems twenty-one lawyers and law professors found in a non-adversarial environment, it is inevitable that additional problems would be exposed, the number and magnitude of which could not be known until they were subjected to litigation in federal courts around the country.[112]

The importance of the Group study can hardly be overstated. Both critics and supporters of the restyling effort must agree that the now-effective Restyled Rules are better off for the input of the Group. The Group study and the Advisory Committee's response to it also teach two important lessons for maximizing the chances of the rules' success—1) the Restylists did not succeed in avoiding substantive changes in the draft presented for public comment, which should help convince the Advisory Committee that the now-effective rules still contain substantive changes; and 2) the Advisory Committee is committed to avoiding substantive changes and is willing to make the changes necessary to avoid them.

III. CRITICS *MUST* ROOT FOR THE RESTYLED RULES

Like it or not, the Restyled Rules now govern procedure in all civil cases in the federal district courts and affect the rights and obligations of millions of litigants. To wish for their failure is to wish harm upon the integrity of our court system. Some critics will simply hope for the best, believing that since the rules are already in effect there is nothing else to be done, but this position is untenable because support of the critics will likely be necessary to ensure that the Advisory Committee reverses the substantive changes (discussed in section IV., A. below) it inadvertently made to the Rules.

Others may continue to criticize the rules in hopes of returning to the former rules. This position is also untenable because at this point we will not, and should not, return to the former rules. The Advisory Committee believes deeply in the quality of the Restyled Rules and is heavily invested in their

be many as yet unidentified problems).

[112] Hartnett, *supra* note 24, at 165.

success. Even if we ought to go back to the old rules, it is highly unlikely that the Advisory Committee would allow it. Moreover, at this point, we should not go back to the old rules. Many of the arguments against enactment of the Restyling Amendments that were valid on November 30, 2007 became invalid after the rules' December 1, 2007 effective date. For example, transition costs that once weighed against enacting the Restyling Amendments now weigh in favor of making the best of them. Much of the cost of transitioning to the Restyled Rules has already been incurred, and switching back to the old rules now would involve its own substantial transition cost. In short, we are past the point of no return to the old rules.

A. There's No Going Back to the Old Rules (Even If We Should)

The Advisory Committee is extremely confident in the Restyled Rules and is not about to resurrect the old ones. Once the project was complete, the chair of the Advisory Committee boasted to the Standing Committee that the Restylists had "done their work well" and expected a "seamless" transition to the Restyled Rules.[113] So confident is the Advisory Committee in its work product that its then Chair went on to predict that in a few years everyone will have forgotten that there ever was a restyling.[114] One can argue that their confidence is unjustified, but the magnitude of their confidence is certainly a better predictor of their willingness to repeal the Restyled Rules than is the degree to which they are justified in being confident.

To be fair, the Advisory Committee has reason to be confident. As discussed above, the stature of the Restylists and the meticulous nature of their work justify some confidence. Moreover, the Restylists have already heard the criticisms of their effort. In some cases, they changed the rules in response to the criticism, but they do not appear to have considered abandoning the project altogether.

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[113] ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, 109TH CONG., REPORT OF THE CIVIL RULES ADVISORY COMM. 5 (June 2006), *available at* http://www.uscourts.gov/rules/Reports/CV06-2006.pdf.

[114] *Id.*

Confidence aside, the Advisory Committee is too invested in the Restyled Rules to reverse course. To resurrect the old rules would be to throw away a decade and a half of painstaking work on the part of dozens of individuals. While it is fair to say that all of that work at this point is a sunk cost, the Advisory Committee is unlikely to ignore its own effort in determining whether or not to reverse course. Like it or not, the old rules are gone for good.

B. We Should Not Go Back to the Old Rules

At this point, it would be more difficult to go back to the old rules than to make the best of the Restyled Rules. Once valid arguments against enacting the Restyling Amendments are not also valid arguments for resurrecting the old rules. This is true for three principal reasons. First, we have already incurred much of the cost imposed by the restyling. Second, switching back to the old rules now would involve its own substantial transition costs. Third, switching back to the old rules would exacerbate some of the cost incurred as a result of the restyling.

Critics resisted the Restyling Amendments on the ground that the costs of transitioning from the old rules to the Restyled Rules would overwhelm any benefit the Style Project would bring in the form of increased clarity. Professor Jeffrey Parker, a prominent critic of the Restyling Amendments, devoted a large part of his critique to the transitional costs or the "switching costs," as he called them. He summarized his criticism as follows: "Like the suggested replacements for the QWERTY keyboard, even if the restyled rules were 'better' in some hypothetical sense, the switching costs will dominate, and the net result will be negative."[115]

According to Parker, law professors will have to spend extra time teaching law students because they will have to teach both the old and new rules, and lawyers, especially those experts in the old version of the rules, will make mistakes because of the change in language.[116] Parker says these costs and other

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[115] Parker, *supra* note 82, at 5.

[116] *Id.*

switching costs will be passed on to litigants and the courts in the form of increased fees, courts costs, and mistakes.[117] Parker says, "In the end, as always, taxpayers and citizens will bear the largest share of the burden."[118]

Parker also complains about the time and energy devoted to revising and expanding existing books and treatises as well as the need for "still more books, articles, and CLE programs to re-educate the Bench and Bar on 'restyling.'"[119] Parker complains that "[f]orests will be consumed in reprinting every book and pamphlet containing the Civil Rules."[120]

Parker was right to be concerned about the trees when he published his criticism, but the trees are dead now. That the transition costs outweigh any benefits of a restyling is a perfectly sensible point, but only before the transition costs have been incurred. At this point, publishers have already printed new books, practitioners have attended the CLEs, and authors have already updated their treatises.[121] To return to the old rules now would require more CLEs (e.g. "Heading for the Hills—a Return to the Old FRCP")—and more treatise and pamphlet revisions and certainly even more dead trees as publishers reprint their rule books and treatises.

Parker also lamented what he called the "cascading effects on other rules systems."[122] Specifically, Parker was concerned that local rules would have to be reexamined, and that the restyling of the federal rules is likely to require a reexamination of the rules of procedure in every state whose rules are modeled on the federal rules. Going back to the old rules, even now, might still save us some of these costs, but they are probably not so great to begin with. Since local rules may not conflict with a

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[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* It seems to me this ship sailed long before the Restyling Amendments became effective. Publishers reprint their copies of the rules each year and needlessly consume trees ensuring that law professors have no less than six brand-new, identical copies of the federal rules, whether we need new ones or not.

[121] *See, e.g.*, 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1181 (3d ed. 2007) (noting the restyling of Rule 7).

[122] Parker, *supra* note 82, at 5.

Federal Rule of Civil Procedure,[123] the need to reexamine and amend them will arise only if the Restyling Amendments make a substantive change that is actually at odds with a local rule.

As for state rules, the extent of those transition costs will depend largely on the smoothness of the federal court transition. The education costs already incurred to transition to the federal rules will not all have to be repaid to transition to state Restyled Rules because there is overlap between the constituencies of the various sets of rules.

Not everyone agreed that the benefits of restyling justified the "switch over" costs. At this point, however, there is no turning back the clock to prevent the time and effort that the Bench and Bar expended to learn the Restyled Rules. These costs are sunk and must not guide future decisions regarding the Restyled Rules.

Some opposed the Style Project on the ground that it made more substantial reform nearly impossible. Professor Harnett despaired that "the restyling may ultimately stand as the best that this generation accomplished in procedural reform."[124] A single generation of attorneys may only be able to absorb one major overhaul to the rules.[125] Moreover, the time-consuming process of restyling may have already delayed other needed amendments to the rules.[126] This criticism was well-founded when it was made, but reverting to the old rules now will only further delay other needed reform.

Even the Restylists acknowledged that the restyling delayed other work. In January of 2006, in her report to the Standing Committee, Judge Rosenthal, Chair of the Advisory Committee, acknowledged that the restyling and electronic discovery projects had caused the Advisory Committee to "put

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[123] FED. R. CIV. P. 83(a) ("A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 . . .").

[124] Hartnett, *supra* note 24, at 178.

[125] Burbank & Joseph, *supra* note 83, at 6.

[126] *Id.* (expressing the concern that the restyling might "retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century."); Hartnett, *supra* note 24, at 178.

aside a number of other issues."[127] The Advisory Committee recognized that there is a limit on how quickly the rules' constituencies can absorb new amendments, as demonstrated by the fact that there will be no amendments to the Federal Rules of Civil Procedure becoming effective in December of 2008.[128] A number of amendments, however, are in the public comment phase of the process.[129]

The Style Project has certainly not prevented the Advisory Committee or the Standing Committee from attending to at least some other matters. Whether or not the Bar will rebel against additional changes to the rules because of the recent furious pace of amendments remains to be seen, but the Advisory Committee is certainly sensitive to the fact that the Bar (and the Academy for that matter) needs time to absorb new amendments. Despite the Committee's continued work, however, Hartnett's point that the Style Project prevented more important reform is still valid. The truth is that we will never know what procedural reforms will not take place because of it. Such reforms fall into the ether of "what might have been." Reversion to the old rules, with all of its corresponding transition costs, would only further delay needed reform.

The restyling was resisted on the ground that it would increase the number of citation errors in court documents. The risk of citation errors has increased for two reasons. First, by further subdividing rules into additional subparts, one has more subparts from which to cite, therefore, increasing the opportunities for an inaccurate citation. The hyper-articulation of Rule 4(a), discussed above, is a good example.

The Restylists recognized that extensive renumbering would cause at least a "short-term inconvenience" and so tried to

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[127] JANUARY 2006 MEETING, *supra* note 107, at 15.

[128] *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE 20-22 (Sept. 2007), *available at* http://www.uscourts.gov/rules/supct0108/ST_Comm_Rpt_Sept_2007.pdf.

[129] Admin. Office of the U.S. Courts, Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure 4, *available at* http://www.uscourts.gov/rules/Brochure_0807.pdf.

minimize it.[130] The Restylists did not change any rule numbers, except that Rule 25(d)(2) is now Rule 17(d) (allowing a public officer sued in his official capacity to be designated by official title rather than by name).[131] The remaining rule numbers remain unchanged. Rule 12 is still the rule addressing defenses and objections,[132] Rule 4 still addresses the summons,[133] Rule 18 is still the claim joinder rule, and so on.[134]

At the subdivision level, however, the changes are quite extensive. For example, former Rule 12(d), titled Preliminary Hearings, is now Rule 12(i), titled Hearing Before Trial. In all, the Restylists renumbered more than forty subdivisions. The Restylists deleted three subdivisions altogether because they believed they were redundant or, in the last case, outdated—Rule 26(a)(5) (listing the various discovery devices), Rule 55(d) (applying the default judgment provisions of the rule to all parties regardless of how the party is denominated), and Rule 81(f) (referencing a now non-existent government official).

The Group unsuccessfully tried to persuade the committees to reexamine the extensive use of subparts because of the increase in citation errors it would cause.[135] The Group proposed using bulleted lists rather than numbered or lettered lists in order to get the accessibility benefits of a more highly articulated rule while avoiding the problem of having to cite to additional subdivisions.[136] The Restylists rejected this proposal,[137] and even the Group was uncertain about how to

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[130] Kimble, *supra* note 55, at 55.

[131] FED. R. CIV. P. 1, Advisory Committee's note (2007 Amendments).

[132] FED. R. CIV. P. 12.

[133] FED. R. CIV. P. 4.

[134] FED. R. CIV. P. 18.

[135] Burbank & Joseph, *supra* note 83, at 3 ("It is not clear, however, that adequate attention has been paid to the potential costs . . . of elaborate articulation and subdivision, costs that include both the effort involved in citing with precision and the consequences of the greater number of errors in citation that are predictable the more highly articulated a rule becomes.").

[136] COMMENTS ON STYLE REVISION, *supra* note 95, at 41; Comment to Restyled FED. R. CIV. P. 12(a)(1)(A).

[137] *See* FED. R. CIV. P. 12(a)(1)(A) (retaining subparts (i) and (ii)).

quote a bullet.[138]

The changes at the subdivision level are all the more problematic because the restyling also changes the language of the rules, meaning that attorneys will not be able to rely on an identity of language or numbering when researching a particular provision. This problem is particularly pernicious in an age of electronic research. Professor Parker describes this concern in his paper on the subject:

> . . . [R]esearch in annotated rules or statutes, or digests, is no longer the dominant mode of legal research. Today, most legal research is conducted through computerized text-searching, so that that new-found "clarity" will deprive the researcher of direct access [to] the "unchanged" prior law.[139]

For their part, the Restylists recognize that extensive renumbering and addition of new subdivisions can cause problems. Professor Kimble answered some of the criticisms in the second of his two-part series on the Restyling Amendments.

> Any reordering was done at the subdivision level—(a), (b), (c)—or lower . . . Even then, the Committee changed only when it was satisfied that the improved sequencing outweighed the possible short-term inconvenience. Throughout this project, the Committee had to balance two competing interests. On the one hand, the current designations are familiar, and changing them will occasionally require users to make adjustments. On the other hand, this chance to set the rules in order—or better order—may not come along for another 70 years, and we should take the long view.[140]

According to Kimble, any problems caused by renumbering and adding subdivisions will constitute a mere "inconvenience" well worth suffering in order to have a better order for the rules.[141] The Restylists did not renumber those provisions

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[138] COMMENTS ON STYLE REVISION, *supra* note 95, at 41 (stating that "for practical reasons" the groups preference is to combine the subdivisions (i) and (ii) because "[h]ow does one deal with bullet points in quoting a rule in a sentence?").

[139] Parker, *supra* note 82, at 6-7.

[140] Kimble, *supra* note 62, at 54.

[141] *Id.*

"burned" into the users' memories; i.e., Rule 12(b)(6) is still Rule 12(b)(6). The Restylists also provided a comparison chart.[142] The chart is referenced in the note following Rule 1, which serves as an introduction and guide to the Restyled Rules as a whole.[143]

Despite these precautions, some citation errors and research difficulties are likely, but reverting to the old rules now would only create new difficulties. Opinions already include citations to the renumbered provisions in the Restyled Rules. Finding this authority would be difficult after putting the provision back in its original position. Swapping one set of difficulties for another is not a workable solution.

IV. Maximizing the Likelihood of the Restyled Rules' Success

Even a critic like me can stomach rooting for the success of the Restyled Rules, especially in light of the fact that there is no longer a realistic alternative to them. But merely rooting for the Restyled Rules is not enough. The Advisory Committee will have to take action to maximize the likelihood that they will be successful.

A. The Advisory Committee Should Repair Two Substantive Changes Resulting from the Restyling

That the Restylists failed to avoid substantive changes to the Rules, despite their best efforts, should come as no surprise. The most serious criticism of the Style Project has always been that the Restylists had not and could not avoid making changes to the law of procedure. This criticism goes straight to the heart of the restyling effort because the goal was to achieve clarity without change. Changing the words of the law without changing its meaning may not even be possible, especially when

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[142] Current and Restyled Rules Comparison Chart, *available at* http://www.uscourts.gov/rules/supct1106/Current_and_Restyled_Rules_Comparison_Chart.pdf.

[143] Fed. R. Civ. P. app. B; Fed. R. Civ. P. 1 Advisory Committee's note (2007 Amendments).

multiple committees with rotating members are making top-to-bottom changes to dozens of rules, many of which are nearly seven decades old. Seven decades of use and court interpretation will charge even the most antiquated and awkward words with meanings not easily separated from the words that gave rise to them in the first place.

Professor Rory Ryan and I questioned the value of restyling given that the Restylists sought to improve only clarity of language rather than clarity of meaning.[144] In doing so, we echoed a concern of Professor Hartnett, who complained of extensive changes to the rules without the desire to create a better procedure, or even a different procedure.[145] Professor Parker argued that the clarity without change "slogan" is untenable because "words cannot be detached from their meanings."[146] Even some of the Restylists do not seem certain that clarity without change can be achieved. Professor Carol Ann T. Mooney, who was the Reporter to the Advisory Committee on the Appellate Rules of Procedure during the restyling of the appellate rules, said that "you cannot separate content or substance from style" and that the "dividing line between style and substance is probably even more illusive and ephemeral than that between substance and procedure."[147] She concludes, as does Professor Parker, that content cannot be separated from the words used to express it.[148]

Only when the Restyled Rules are subjected to the crucible of litigation will we know the extent of the substantive changes in the Restyling Amendments. Neither the Group nor the Advisory Committee has the same ability or incentive to find the changes the Bar does. In all likelihood, there are substantive changes that the Advisory Committee and the Group missed. What is certain is that there are two substantive changes that the Group caught but the Advisory Committee refused to make. Both of these changes are undesirable but easy to fix. The

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[144] Counseller & Ryan, *supra* note 3.

[145] Hartnett, *supra* note 24, at 156.

[146] Parker, *supra* note 82, at 7.

[147] Mooney, *supra* note 16, at 237-38.

[148] *Id.* at 237.

Restylists deleted Rule 26(a)(5) and eliminated the requirement that stipulations governing discovery procedures be in "writing." Both of these changes alter the law of procedure for the worse. The Advisory Committee should repair this damage as soon as possible.

1. The Advisory Committee Should Reinsert Former Rule 26(a)(5)

The Restylists eliminated Rule 26(a)(5) altogether. Rule 26(a)(5) indexed the various discovery instruments. The provision was titled "Methods to Discover Additional Matter" and provided:

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.[149]

Looking at the text of this provision alone, without benefit of the case law, the provision appears to be a merely redundant index of the discovery instruments, all of which are mentioned in separate rules. The abrogation of Rule 26(a)(5) is a substantive change, however, because courts relied upon it to overcome arguments that certain procedures did not constitute discovery devices and, therefore, did not need to be propounded within the discovery period. Specifically, attorneys argued that Rule 36 requests for admission[150] and Rule 45 subpoenas are not discovery devices and may be served and must be answered outside the discovery period.[151]

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[149] FED. R. CIV. P. 26(a)(5), 28 U.S.C.A. app. (West 1992 & Supp. 2007) (amended 2007).

[150] Joseph L. v. Conn. Dep't of Children & Families, 225 F.R.D. 400, 402 (D. Conn. 2005). *But see* Hurt v. Coyne Cylinder Co., 124 F.R.D. 614, 615 (W.D. Tenn. 1989).

[151] *See, e.g.*, Dag Ent., Inc. v. Exxon Mobile Corp., 226 F.R.D. 95, 104 (D.D.C. 2005) (plaintiff arguing Rule 45 subpoenas not subject to ordinary discovery deadlines). *But see* Mortgage Info. Serv., Inc. v. Kitchens, 210 F.R.D. 562, 567 (W.D.N.C. 2002) (noting that a Rule 45 subpoena is not "discovery" when used to secdure the production at trial

Again, the Group reported to the Committee the problem with abrogating the provision, even citing cases in which the provision was used to defeat arguments that requests for admission and Rule 45 subpoenas are not discovery devices.[152] The Restylists certainly heard and understood the Group's argument against abrogation of the provision. The Advisory Committee noted that the Group's criticism with respect to the elimination of Rule 26(a)(5) was "fascinating."[153] At least initially, the Advisory Committee seemed to share the Group's concern when it noted, "If deleting the seemingly redundant index will encourage lawyers to make such arguments, or will cause courts greater difficulty in rejecting them, we might rethink this style choice."[154] Despite this indication that the Committee would reconsider its decision, the Restyled Rules do not contain the provision, nor do they contain any other "seemingly redundant index" of discovery devices.

One can understand the Restylists' position that 26(a)(5) is merely redundant when examining the language of the rule in isolation, but case law has assigned Rule 26(a)(5) an importance beyond a mere redundant index of discovery devices. As the Group reported to the Committee, "Elimination of redundancy is a commendable goal, but existing Rule 26(a)(5) actually settles some disputes."[155] The case law is replete with examples of courts relying upon Rule 26(a)(5) to reject arguments that certain instruments are not discovery devices.[156]

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of originals of documents previously disclosed).

[152] COMMENTS ON STYLE REVISION, *supra* note 95, at 8 (Comment on Proposed Deletion of Rule 26(a)(5) ("Elimination of redundancy is a commendable goal, but existing Rule 26(a)(5) actually settles some disputes.") (citing *Joseph L*, 225 F.R.D. at 402 and Parker v. Learn the Skills Corp., 2004 U.S. Dist. LEXIS 21498, at *8 n.4 (E.D. Pa. 2004))).

[153] CIVIL RULES ADVISORY COMM., COMMENTS ON BURBANK/JOSEPH REPORT SUGGESTIONS 10 (2005) (First Draft).

[154] *Id.*

[155] COMMENTS ON STYLE REVISION, *supra* note 95, at 8 (Comment on Proposed Deletion of Rule 26(a)(5)).

[156] *Dag Ent.*, 226 F.R.D. at 104 ("subpoena pursuant to Federal Rule of Civil Procedure 45 to a third-party is not exempt from discovery deadlines in scheduling orders. Rather, contrary to Plaintiffs' assertions, Rule 45 subpoenas are "discovery" under Rules 16 and 26 of the Federal Rules of Civil Procedure, and are subject to the

The Committee should amend Rule 26 to restore Rule 26(a)(5). Though the provision may be redundant in a sense—other rules reference each of the discovery devices mentioned in Rule 26(a)(5)—none of the other rules explicitly refer to each device as "methods to discovery additional matter" and state that the discovery devices mentioned in Rule 26(a)(5) are the methods by which "[p]arties obtain additional discovery." Case law makes clear that Rule 26(a)(5) has become the "rule" courts rely upon to dispel such arguments.

2. The Advisory Committee Should Replace the Written Stipulation Requirement in the Discovery Rules

The Restylists substituted the word "stipulation" for the words "written stipulation" throughout the discovery rules. The discovery rules no longer require a written stipulation to modify discovery procedures. This change is substantive and undesirable.

The Group highlighted the "written stipulation" problem for the Advisory Committee. In its report to the Committee, the Group said: "The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other Restyled Rules (29(b),

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same deadlines as other forms of discovery."); Integra Lifesciences I, Ltd. v. Merck KGaA, 190 F.R.D. 556, 561 (S.D. Cal. 1999) ("Case law establishes that subpoenas under Rule 45 are discovery, and must be utilized within the time period permitted for discovery in a case."); Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 177 F.R.D. 443, 445 (D. Minn. 1997) (subpoenas under Rule 45, invoking the authority of the court to obtain the pretrial production of documents and things, are discovery within the definition of Fed. R. Civ. P. 26(a)(5) and are therefore subject to the time constraints that apply to all other methods of formal discovery); Rice v. United States, 164 F.R.D. 556, 557 (N.D. Okla. 1995) ("After careful consideration, the Court finds that the Rule 45 subpoenas duces tecum in this case constitute discovery."); see also Puritan Inv. Corp. v. ASLL Corp., Civ. No. 97-1580, 1997 WL 793569, at *1 (E.D. Pa. Dec. 9, 1997) ("Trial subpoenas may not be used, however, as a means to engage in discovery after the discovery deadline has passed."); BASF Corp. v. Old World Trading Co., Civ. No. 86-5602, 1992 WL 24076, at *2 (N.D. Ill. Feb. 4, 1992) ("Here, discovery has been closed for almost eleven months, and the court will not allow the parties to engage in discovery through trial subpoenas.").

30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 59(c))." [157] While it is clear from the Advisory Committee's work product that it was aware of the Group's comment on the change, the record does not make absolutely clear why the Advisory Committee chose not to make the recommended change.[158] The deletion of "written" appears to be a result of the effort to "reduce inconsistencies by using the same words to express the same meaning."[159] In the committee note following Rule 1, we are told that one inconsistency was that the rules used the terms "agree," "consent," and "stipulate," and only sometimes qualified these terms with the word "written."[160] The elimination of the word "written" appears to be the product of the Restylists effort to reduce the number of variations. The note tells us that, with respect to the handling of the term stipulation and similar terms, "none of the changes, when made, alters the rule's meaning."[161] This claim is false.

The minutes of the May 2006 meeting of the Advisory Committee show that the committee discussed the "global issue" of the rules' use of the words "agree," "consent," and "stipulate."[162] With respect to the elimination of the word "written," the minutes state only that "[a]lmost all agreements are reduced to writing, at least in electronic form. Careful practitioners invariably dispatch a confirming memorandum."[163] This is an odd response from the Advisory Committee since the requirement of a writing was the reason agreements were reduced to writing and confirming memorandum were dispatched. The Advisory Committee also defends its decision on the ground that the change is not substantive so long as lawyers comply, not with a rule's requirements, but with the commands of a careful practice. This position is simply not an

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[157] COMMENTS ON STYLE REVISION, *supra* note 95, at 9 (Comment on Restyled Rule 29(b)).

[158] CIVIL RULES ADVISORY COMM., *supra* note 153, at 3.

[159] FED. R. CIV. P. 1 Advisory Committee's note (2007 Amendments).

[160] *Id.*

[161] *Id.*

[162] MAY 2006 MEETING, *supra* note 109, at 8.

[163] *Id.*

answer to the criticism that elimination of the word "written" is a substantive change. The Advisory Committee is not, or at least should not be, writing rules just for the "careful practitioner."

The Restylists' substantive change will have a broad impact because numerous rules contained the phrase "written stipulation." Former Rule 29 required a written stipulation in order for the parties to modify procedures governing discovery, including the time, place, and manner in which depositions are taken.[164] Former Rules 30(a)(2)(A) and 31(a)(2)(A) allowed parties to stipulate in writing that they may take more than ten depositions.[165] Former Rule 33(a)(2)(A) allowed the parties to serve more than twenty-five interrogatories on another party so long as the parties so stipulated in writing.[166] Former Rule 36(a) permitted parties to modify by written stipulation the time limits for serving and the deadlines for responding to requests for admissions.[167] The restyled version of each of these rules eliminates the requirement of a written stipulation, requiring instead a mere "stipulation."[168]

The danger of the restyled discovery rules is that they will force courts to spend a great deal of time exploring whether an oral stipulation exists and, if so, what its terms are. The former rule allowed courts to simply rely on the written requirement in the rules and avoid the morass of determining whether an oral agreement existed. For instance, in one case, the defendant failed to answer plaintiff's requests and interrogatories on the ground that both parties had agreed the defendants did not have to respond to them.[169] Both sides provided the court with affidavits supporting their positions—the plaintiff's that no agreement existed, and the defendant's that one in fact did

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[164] FED. R. CIV. P. 29, 28 U.S.C.A. app. (West 1992 & Supp. 2007) (amended 2007).

[165] FED. R. CIV. P. 30(a)(2)(A) (Depositions Upon Oral Examination) and 31(a)(2)(A) (Depositions Upon Written Questions); 28 U.S.C.A. app. (West 1992 & Supp. 2007) (amended 2007).

[166] FED. R. CIV. P. 33(a)(2)(A), 28 U.S.C.A. app. (West 1992 & Supp. 2007) (amended 2007).

[167] FED. R. CIV. P. 36(a), 28 U.S.C.A. app. (West 1992 & Supp. 2007) (amended 2007).

[168] *See* FED. R. CIV. P. 29, 30, 33, and 36.

[169] Tropix, Inc. v. Lyon & Lyon, 169 F.R.D. 3 (D. Mass 1996).

exist.[170] Citing to former Rule 29, the court decided that it did not need to resolve the conflicting affidavits, saying "[i]n the absence of such a written stipulation, there simply has not been an enlargement of time."[171] The court went on to expressly hold that in order to obtain additional time within which to respond to discovery, "a party must either obtain a written stipulation signed by all the parties or an Order of the Court enlarging the time."[172] That district court is not alone. Several other courts, including the Third Circuit Court of Appeals, have refused to enforce alleged oral agreements by relying upon the express written requirement in the discovery rules.[173] These holdings are clearly at odds with the Restylists' position that eliminating the word "written" does not work a substantive change.

A number of courts have eloquently expressed why a written requirement is desirable. The District of Massachusetts explained:

> "[T]he requirement of a written stipulation was promulgated to avoid just the sort of dispute which has arisen in this case in which one attorney asserts that the attorney for the other side agreed to an enlargement and the attorney for the other side denies that any such agreement exists."[174]

The court continued, "Manifestly, it would be a waste of judicial resources were the courts required to resolve such disputes when the alternative is that all counsel need to do is enter a written stipulation in order to effect an enlargement [of

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[170] *Id.*

[171] *Id.*

[172] *Id.* at 4.

[173] Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298 (3d Cir. 1995) (refusing to allow a party to adopt another party's discovery requests in absence of written stipulation and noting that plaintiff failed to comport with Rule 29's requirement of a written stipulation); Clean Earth Remediation and Constr. Serv., Inc. v. American Int'l Group, Inc., 245 F.R.D. 137, 139 (S.D.N.Y 2007); Eastman v. Ameristep Blinds, Inc., 2007 U.S. Dist. LEXIS 43493, at *3 (E.D. Mich. June 15, 2007) (stating that Rule 29 requires a written stipulation to "avoid the present situation where conflicting recollections or interpretations of verbal communications are all that is presented for the court's use in making a determination").

[174] *Tropix*, 169 F.R.D. at 3-4.

time]."[175] Just this past year, the Eastern District of Michigan refused to enforce an alleged oral agreement, explaining that Rule 29 "requires *written* stipulation in order to modify the limitations placed on discovery, precisely to avoid the present situation where conflicting recollections or interpretations of verbal communications are all that is presented for the court's use in making a determination."[176]

Unfortunately, by eliminating the requirement of a written stipulation, the Restylists are forcing courts to engage in the "waste of judicial resources" the Massachusetts and Michigan district courts were concerned with and which the written stipulation was designed to prevent. No longer able to rely upon the word "written" in the discovery rules, courts will have to expend the time and effort necessary to determine, first, whether the parties reached an agreement and, if so, second, what the terms of that agreement were. The elimination of this single word from the discovery rules will force courts to increase the already extraordinary commitment of time and resources to the adjudication of discovery disputes. The reported cases cited are surely but a tiny fraction of the unreported cases in which courts rely upon the provision to avoid adjudicating swearing matches regarding oral stipulations.

The elimination of "written" may also discourage cooperation during discovery. Practitioners will avoid discussing the possibility of a stipulation for fear of a dispute over whether the discussion was in fact an oral and, under the new rules, enforceable stipulation.

The Committee can and should avoid a substantive change and its undesirable consequences simply by reinserting the word written before the word stipulation in Rules 29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), and 36(a)(3).

B. The Advisory Committee Should Continue to Resist Any Call for a Rule of Construction to Prevent Supersession

The supersession issue arises from the language of the

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[175] *Id.* at 4.

[176] *Eastman*, 2007 U.S. Dist. LEXIS 43493, at *3.

Rules Enabling Act. The Rules Enabling Act not only authorizes the Supreme Court to create rules of practice and procedure for federal district courts,[177] the Act also provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."[178] This provision is known as the supersession clause of the Rules Enabling Act. Because of the supersession clause, the Supreme Court, through the rule-making process, can enact a rule that displaces an Act of Congress.[179] Prior to the effective date of the amendments, commentators were concerned that the Restyling Amendments would trump statutory provisions because all the rules of procedure would be stamped with a new effective date. Critics, including members of the Group, were concerned that the Restyling Amendments would supersede prior federal statutes.[180] One critic urged the Advisory Committee to include a rule of construction in the Restyled Rules that prohibited courts from giving the rules an interpretation that conflicted with a law in effect before the December 1, 2007 effective date of the Restyled Rules.[181]

In response to these concerns, and the concerns of the Group in particular, the Advisory Committee amended Rule 86(b) in an attempt to prevent the Restyling Amendments from having supersession effect. Rule 86(b) now reads:

> **December 1, 2007 Amendments.** If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.

With Rule 86(b), the Restylists were working against a background of jurisprudence in which there are two basic supersession analyses. Some courts follow a last-in-time rule—

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[177] Rules Enabling Act, 28 U.S.C. § 2072(a) (2006).

[178] *Id.* § 2072(b).

[179] *Id.* (properly promulgated rules supersede "[a]ll laws" in conflict with them.). *See also* Hartnett, *supra* note 24, at 171.

[180] Burbank & Joseph, *supra* note 83, at 4 (saying that the supersession clause caused the "most difficult problems" the Group confronted); Hartnett, *supra* note 24, at 171.

[181] Hartnett, *supra* note 24, at 177.

i.e., later enacted rules trump earlier statutes and later statutes trump earlier rules.[182] Other courts look at the purpose of the rule or amendment to determine supersession.[183] These purposovist courts do not give supersession effect to rules enacted to improve style or clarity.[184] For these courts, the Restyling Amendments would not supersede other laws, irrespective of their effective date, because their purpose was to improve clarity.

As Professor Hartnett notes, these two approaches to the supersession issue "mirror[] the conflict in approaches to interpretation generally."[185] The last-in-time judges tend to be textualists, and those who look at the purpose of the rule to determine supersession are purposovists. Hartnett believed that a rule of construction was needed to prevent supersession.[186] Hartnett proposed two different rules of construction, both of which prohibited a court from construing a restyled rule to conflict with any law in effect prior to the December 1, 2007 effective date of the Restyling Amendments.[187]

This section of the article discusses why a rule of construction, such as the one Hartnett proposed, is unnecessary and would be harmful. The Restyled Rules are unlikely to cause significant supersession problems in the first place, but Rule 86(b) probably resolves any supersession problems the Restyled Rules would have otherwise caused. Most importantly, even if the Restyled Rules might supersede other laws, a rule of construction only exacerbates interpretational problems associated with the Restyled Rules.

1. Rule 86(b) Prevents Restyling Supersession

Rule 86(b) is likely to prevent courts that might have

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[182] Floyd v. U.S. Postal Serv., 105 F.3d 274, 278 (6th Cir. 1997); Hartnett, *supra* note 24, at 173.

[183] Autoskill Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1485 n.8 (10th Cir. 1993); Hartnett, *supra* note 24, at 173.

[184] *Autoskill*, 994 F.2d at 1485 n.8; Hartnett, *supra* note 24, at 173.

[185] Hartnett, *supra* note 24, at 175.

[186] *Id.* at 177.

[187] *Id.*

otherwise done so from giving the Restyled Rules supersession effect. For purposovists, Rule 86(b) is, admittedly, unnecessary to prevent supersession because their decision on the supersession issue does not turn on a "priority in time" analysis.[188] Thus, judges of the purposovist interpretational approach were unlikely to give the Restyled Rules supersession effect, regardless of their effective date. The Restyling Amendments make clear in every committee note that their purpose is to improve the style and clarity of the federal rules, not to make substantive changes. Because the purpose of the Restyling Amendments is merely to improve clarity and style, the purposovist judges will not give them supersession effect, irrespective of the timing of their enactment compared to other, potentially contradictory federal statutes.

Rule 86(b) will, however, be effective in preventing a textualist judge from giving supersession effect to the Restyling Amendments. If and when a court reaches the point in its supersession analysis where the effective date of the rule becomes relevant,[189] Rule 86(b) simply requires the court to ignore the Restyling Amendments' effective date. Essentially, Rule 86(b) makes the effective date a non-event for purposes of the supersession analysis.

Hartnett argues that a rule cannot have an effective date for one purpose—satisfying the notice requirements of the Rules Enabling Act—and not for another—the priority in time analysis under 2072(b).[190] Hartnett sees Rule 86(b) as an attempt to govern the interpretation of a federal statute—section 2072 of the REA. Hartnett says, "a Rule can't tell us how to interpret a statute—unless a statute so provides" and Rule 86(b) violates this limitation on rulemaking authority because Congress has not given the Supreme Court the power to "'fix the extent' to

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[188] *Id.* at 173 (citing *Autoskill*, 994 F.2d at 1485 n.8).

[189] *See id.* (citing Callihan v. Schneider, 178 F.3d 800, 803-04 (6th Cir. 1999) and saying "It did not matter to the Court of Appeals that Rule 24(a) had been amended in 1998 as part of the restyling of the Federal Rules of Appellate Procedure - or that the meaning of Rule 24(a) was the same after 1998 as it had been before the 1996 amendments to the *in forma pauperis* statute. The key issue was which of two conflicting rules was last in time.")

[190] *Id.*

which a Rule would 'take effect' for purposes of § 2072(b)." [191] If Rules could tell us how to interpret statutes without statutory authorization, Hartnett says, then the amendment to section 2072 authorizing rules that "define when a ruling of a district court is final for purposes of appeal under § 1291 would have been completely unnecessary."[192]

On the other hand, Rule 86(b) is probably better read, not as a rule governing construction of section 2072, but as a rule that prohibits a particular interpretation of the Restyling Amendments. While a rule cannot govern statutory interpretation, it can govern the construction of a rule.[193] The central inquiry in any amendment-based supersession analysis is whether the amendment reflects intent to abrogate a prior conflicting law.[194] Of course, the fact that a rule's effective date is later than the law with which it conflicts is an indication that such intent exists.[195] Thus, the phrase "priority in time" should not be seen as a product of attempts to interpret section 2072. Instead, it is better viewed as a product of attempts to interpret the rules themselves, i.e., whether the rules reflect an intent to abrogate prior laws. Rule 86(b) does not change the effective date of the rules, or make them ineffective for a particular purpose. Instead, it prohibits a court from inferring intent to abrogate a prior law based upon the Restyled Rules effective date.

Even if Hartnett is correct—that Rule 86(b) is an impermissible attempt to govern statutory construction—the remedy is to eliminate the provision altogether, not to add a rule of construction. Ironically, the Restylists would have preferred to leave out Rule 86(b) in the first place. Neither the restyled

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[191] *Id.* at 177.

[192] *Id.*

[193] *See, e.g.*, FED. R. CIV. P. 1 (requiring the Rules to "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

[194] *Callihan*, 178 F.3d at 802-03 (noting that "repeals by implication are not favored by courts") (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987); Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)).

[195] *Id.* ("[W]hen provisions of two acts are not reconcilable, the later act constitutes an implied repeal of the earlier statute.") (internal citations omitted).

appellate rules or criminal procedure rules contains such a rule to prevent supersession. If courts do seize upon Hartnett's argument, the solution is to remove Rule 86(b), not to add a rule of construction.

2. A Rule of Construction Would Exacerbate Interpretational Difficulties

The supersession issue changed on the effective date of the Restyling Amendments. Before December 1, 2007, the issue was whether the risk of supersession outweighed the benefits of the Restyling such that the Style Project ought to have been terminated. Now that the amendments are law, the issue is how to make the best of them. Now the critical task is to take the steps most likely to reduce or prevent the supersession problems that concerned both critics and Restylists alike. A rule of construction preventing an interpretation of the Restyled Rules that conflicts with prior laws will only compound the difficulties in transitioning from the old to the Restyled Rules.

Assuming the Restylists would not give up the project altogether, Professor Hartnett favored a rule of construction over Rule 86(b) as a solution to the supersession problem. Hartnett proposed two alternatives. His first option was:

> No provision in Rules 1-5.1, 6-73, or 77-86, as amended effective December 1, 2007, may be construed to conflict with another law in effect on November 30, 2007.[196]

His second option was:

> All provisions in Rules 1-5.1, 6-73, or 77-86, as amended effective December 1, 2007, must be construed to be consistent with all other laws in effect on November 30, 2007.[197]

A rule of construction is untenable because of the problems it will cause with conflicts that predate the Restyling Amendments. A rule of construction would have an impact on all supersession issues, even those not created by the restyling.

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[196] Hartnett, *supra* note 24, at 177.

[197] *Id.*

A rule of construction might force a court to change the meaning of a rule in order to comply with the rule of construction even when the apparent conflict was not created by the restyling. Consider the following example. A reasonable and common reading of Rule R conflicts with the reasonable and common reading of Statute S on November 30, 2007, one day before the effective date of the Restyling Amendments. A reasonable and common reading of Restyled Rule R leads to the same conflict with Statute S on December 1, 2007. When the conflict becomes an issue in a case, the court will be forced to give Rule R a different reading than the reasonable and common one, not because it is the best interpretation, but because the court is commanded to give the rule a reading not in conflict with the statute.

And what if the rule *should* be construed to conflict with a prior law, not because it has been restyled, but because the circumstances and accepted cannons of construction demand it? Surely courts had not yet exhausted all of the interpretational issues in the Federal Rules of Civil Procedure even before the restyling. A rule of construction such as those proposed above limits the possible meanings to be assigned a particular provision. What if it eliminates the best meaning? As Professor Cooper pointed out on behalf of the Restylists, while substantive changes are a thing to be avoided, freezing the meaning of the rules, or even severely curtailing the meanings they can possess is also to be avoided.[198]

A possible response to the "freezing" point is that that a rule of construction would only need to prevent courts from construing the *restyled* portion of the rule to conflict with prior laws. Even if such a rule of construction did not "freeze" meaning, at a minimum, it would require courts to determine whether the conflict is one caused by the restyled rule or the former rule. The rule of construction would force courts to treat the Restyling Amendments as a mask on the Federal Rules. With each supersession analysis, courts would have to determine if it was the masked rules or the unmasked rules that

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[198] Cooper, *supra* note 23, at 1767.

conflicted with the other law, and apply the rule of construction only when the masked rules caused the conflict. This approach to supersession, however, presupposes that the Restyling Amendments can be cleanly excised from the rules and that what remains would be the former rules. But this is not the case. The restyled and former provisions of the rules now exist as an integrated whole. The textual changes resulting from the restyling are so pervasive that it would be difficult to excise the Restyling Amendments and have something meaningful remain. The Restyling Amendments are not a mask on the Federal Rules now. They are its face. And its arms, legs, and body for that matter.

V. CONCLUSION

We need the Restyling Amendments to succeed because the just adjudication of the rights and obligations of hundreds of thousands of federal civil litigants depend upon their success.[199] Too much is at stake to hope for a "we told you so" moment. A time may come when we critics can say that the Style Project's benefits did not justify its costs. But to what end would we say it? The former rules are gone, and they are not coming back. We have no choice but to make the best of the Restyled Rules, and the stature and hard work of both the Restylists and the members of the Group make rooting for them an easier pill to swallow. But whether it is easy or hard to root for the Restyled Rules, we all, especially us critics, must do it. It will take broad support to convince the Advisory Committee to repair the substantive changes to the discovery rules. And as the Group pointed out, there are likely to be other undesirable substantive changes that have yet to be found. So, critics cannot withdraw from the discussion of the Restyled Rules. Instead, they must be on the lookout for these changes and lead the way in addressing them when they are discovered. Ironically, the Restyled Rules require from all of us the very thing that might have stopped the Style Project in the first place—vigilance. The Group's criticisms improved the restyled rules, but did not stop the

[199] ADMIN. OFFICE OF THE UNITED STATES COURTS, *supra* note 4, at Table C.

project altogether. But one cannot help but believe that a broader base of interest and criticism might have succeeded where the twenty-one members of the Group failed. In the end, the most important lesson of the Style Project may be that we need to be more careful stewards and observers of both the rules and the rulemaking process. In this sense, the Restyled Rules do not ask anything different from us than the old rules did. So, from now on, let us call the Restyling Amendments by their proper name—the Federal Rules of Civil Procedure.

REPUDIATING *EVERSON*: ON BUSES, BOOKS, AND TEACHING ARTICLES OF FAITH

*Mark Strasser**

I. INTRODUCTION

Ever since deciding *Everson v. Board of Education*,[1] the Court has wrestled with the proper way to characterize the limitations imposed on states by the Establishment Clause. Many of the cases have involved the extent to which a state can give aid to the parents of children attending primary and secondary sectarian schools. The Court's understanding of the limits on this kind of aid has changed markedly over the past sixty years. First, the limitation involved an analysis of the degree to which the state would be aiding religious teaching, and then it evolved into an analysis of whether the state was offering non-sectarian benefits to the religious and non-religious alike. Finally, the analysis looked to whether a majority of the Court believes that a person could reasonably impute to the state what admittedly is support of religious teaching. While the changes in the jurisprudence were often not dramatic, they have cumulatively resulted in a jurisprudence that is hard to reconcile with either the spirit or the holding of *Everson*, even when *Everson* is understood to be much less separationist than is commonly supposed.

Part II of this article traces the development of the Court's Establishment Clause jurisprudence with respect to aid to pri-

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[1] 330 U.S. 1 (1947).

mary and secondary schools from the 1940s to the 1970s, suggesting that a rough guide is discernible with respect to the line between permissible and impermissible funding. Part III discusses some of the Court's cases in the 1980s and 1990s in this area, noting how the jurisprudence changed in subtle and not-so-subtle ways, and culminated in a jurisprudence that is neither principled nor workable. The article concludes by suggesting that the current jurisprudence not only contradicts the letter and spirit of *Everson*, but guts the basic protections that the Establishment Clause is designed to offer.

II. NO SUPPORT FOR RELIGIOUS EDUCATION

Contemporary Establishment Clause jurisprudence can hardly be called transparent[2] at least in part because the jurisprudence has changed markedly over the past sixty years. That said, the jurisprudence with respect to the conditions under which the State can provide aid benefiting primary and secondary sectarian institutions has not always been as difficult to fathom as is sometimes claimed.[3] While the Court has never articulated a principle clearly delineating between permissible and impermissible kinds of aid, a rough rule emerged that permitted aid: (1) for specified kinds of secular materials, and (2) for families with children attending sectarian schools, as long as certain conditions had been met. This understanding seems to have governed the Court's holdings in this area at least through the 1970s, although the dicta in some of the Court's decisions during

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[2] Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) ("It is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory."). *Cf.* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray."); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional.").

[3] *Cf.* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) ("[O]ur decisions [concerning the Establishment Clause] have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility . . . .").

this period provided the basis for the radical transformation that subsequently occurred in the jurisprudence.

A. Support for Safety and Health

Everson v. Board of Education[4] is the seminal case in contemporary Establishment Clause jurisprudence.[5] It is important both because of its holding that Establishment Clause guarantees have been incorporated through the Fourteenth Amendment against the states,[6] and because it attempts to set out some of the parameters regarding the conditions under which state aid can be offered to sectarian schools without offending constitutional guarantees. The decision itself sent rather mixed messages, however, because its very robust language regarding the required degree of separation between Church and State did not seem compatible with the Court's upholding the statute at issue.[7]

The disparity between the tone and the holding of the opinion has led some commentators to suggest that the Court was

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[4] 330 U.S. 1 (1947).

[5] James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race and Politics*, 54 UCLA L. REV. 547, 556 (2007) (discussing the "seminal case of *Everson v. Board of Education of Ewing*"); William G. Frey & Virginia Lynn Hogben, *Vouchers, Tuition Tax Credits, and Scholarship-Donation Tax Credits: A Constitutional and Practical Analysis*, 31 STETSON L. REV. 165, 167 (2002) (discussing the "seminal decision addressing government assistance to religious schools, *Everson v. Board of Education of Ewing Township*"); Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 338 (2002) ("Any analysis of the constitutional permissibility of governmental financial aid to sectarian schools necessarily begins with the *Everson* precedent, which was the seminal case in the development of the Court's modern Establishment Clause jurisprudence.").

[6] *See Everson*, 330 U.S. at 15. *See also* Walz v. Tax Comm'n, 397 U.S. 664, 702 (1970) ("The Establishment Clause was not incorporated in the Fourteenth Amendment until Everson v. Board of Education was decided in 1947.") (citation omitted).

[7] *See Everson*, 330 U.S. at 19 (Jackson, J., dissenting).

> [T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent,'—consented."

Id.

simply being inconsistent.[8] Other commentators suggest that the decision is unproblematic in reasoning and result, except for some overly exuberant rhetorical flourishes.[9] In any event, *Everson* demands close attention, both because it was the first case in modern Establishment Clause jurisprudence,[10] and because it foreshadows many of the competing considerations that continue to play a role when the Court seeks to draw a line between permissible and impermissible state aid to sectarian schools.

At issue in *Everson* was the following statute:

> Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.[11]

The statute performed two functions: (1) it authorized school boards to provide transportation for children attending public and private non-profit schools, and (2) it required school districts providing transportation to public school students to

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[8] *See, e.g.*, Robert A. Holland, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CAL. L. REV. 1595, 1604 (1992) (discussing "*Everson*'s inconsistency between rationale and holding").

[9] *Cf.* Akhil Reed Amar, *2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1245 (2002) ("Black's *Everson* opinion did contain some loose language in places, but its key logic was sound, as was its holding on its facts.").

[10] Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315, 1363 (2007) ("*Everson v. Board of Education* is a landmark case . . . because it marks the beginning of modern Establishment Clause jurisprudence . . . .").

[11] *Everson*, 330 U.S. at 3 n.1 (citing N.J. REV. STAT. 18:14-8 (1941)).

provide it to children attending private, non-profit schools, as long as the private school was along the established school route. Arguably, (2) would require no extra expenditure of funds beyond the *de minimis* expenditure involved in stopping along the route to pick up and drop off the children at the bus stops near their homes.[12] In contrast, (1) permitted, but did not require, additional expenditures, since the boards were authorized to provide transportation for children who, for example, were going to a private school that was not located along an established school route.

A New Jersey taxpayer challenged the right of the school board to authorize reimbursement of transportation expenses incurred by children using public buses to go to and from parochial school,[13] arguing that the authorizing statute violated state and federal constitutional guarantees.[14] The New Jersey Supreme Court upheld the constitutionality of the statute,[15] and the case was appealed to the United States Supreme Court.

After making clear that the constraints imposed by the Establishment Clause on the federal government also apply to the states,[16] the *Everson* Court tried to explain the limitations im-

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[12] *See* Everson v. Bd. of Educ., 44 A.2d 333, 337 (N.J. 1945) ("The intent of P.L.1941, Chapter 191, is that pupils may be transported to parochial schools only as an incident to the transportation of pupils to the public schools since the statute provides that children attending schools could be furnished transportation by any school district from any point *on an already established school route* to any other point *on such established school route*. Payment of such expense out of local taxes is the payment of 'incidental expenses' or 'transportation of pupils' authorized by R.S. 18:7-78.").

[13] *Everson*, 330 U.S. at 3 ("The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system.").

[14] *Id.* at 3-4.

[15] *See Everson*, 44 A.2d at 337 ("We conclude that there is nothing on the face of the resolution or statute or in the record before us showing that either the statute or the resolution enacted thereunder is unconstitutional or does violence to the Constitution for any of the reasons urged.").

[16] *See Everson*, 330 U.S. at 15 ("The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause.") (footnote omitted).

posed by that Clause. States are precluded from "set[ting] up a church"[17] or from passing "laws which aid one religion, aid all religions, or prefer one religion over another."[18] Indeed, the Court suggested that "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State,'"[19] thereby implying that the Constitution requires Church and State to be in completely non-overlapping spheres.[20]

While speaking in rather absolute terms,[21] the *Everson* Court nonetheless found that the reimbursement at issue did not violate constitutional guarantees.[22] The Court explained that the Constitution's prohibiting the use of public funds for the support of religion was not meant to preclude every use of public funds that might in some way benefit religion. Such a broad interpretation of the rule would prohibit states from extending any kind of aid, including police and fire services,[23] which would make states an "adversary" of religion.[24] An interpretation making each State an adversary of religion misrepresents the constitutional guarantee, since state power "is no more to be used so as to handicap religions, than it is to favor them."[25] Instead, the

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[17] *Id.*

[18] *Id.*

[19] *Id.* at 16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[20] *Cf.* Carolyn A. Deverich, Comment, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accommodationist Argument for the Constitutionality of God in the Public Square*, 2006 B.Y.U. L. REV. 211, 222 (2006) ("*Everson v. Board of Education* launched the modern Establishment Clause epoch in which courts adopted a strict separationist approach to church-state interaction by reference to Jefferson's formidable wall of separation.") (footnote omitted); Megan A. Kemp, Comment, *Blessed Are the Born Again: An Analysis of Christian Fundamentalists, the Faith-Based Initiative, and the Establishment Clause*, 43 HOUS. L. REV. 1523, 1543 (2007) (suggesting that "[t]he strict separation approach embodies Thomas Jefferson's metaphor of an impregnable wall that separates church and state.").

[21] *See Everson*, 330 U.S. at 19 (Jackson, J., dissenting) (describing "the undertones of the opinion [as] advocating complete and uncompromising separation of Church from State").

[22] *Id.* at 17 (majority opinion) ("Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.").

[23] *Id.* at 17-18.

[24] *See id.* at 18.

[25] *Id.*

prohibition on state aid is narrower in scope, so that some kinds of aid, but not others, are permissible.

When upholding the state reimbursement of parents for transportation costs, the Court emphasized that this aid was "so separate and so indisputably marked off from the religious function,"[26] that the state could not plausibly be thought to be directly supporting religious activities or teaching. By focusing on the function that the aid was to perform, the Court implied that sectarian aid could not be offered to support religious functions, but could be offered to support non-religious functions.

One complicating factor in *Everson* not emphasized by the Court was that "the township resolution authorized reimbursement only for parents of public and Catholic school pupils."[27] While there was no evidence that any child attending a private, non-profit, non-Catholic school had been denied travel reimbursement, or even that there was a child who would have attended such a school if only transportation reimbursement had been provided,[28] the resolution nonetheless facially discriminated among religions.[29] Had the resolution's constitutionality been analyzed in light of its expressly distinguishing among religions,[30] the statute would likely have been struck down. As Justice Jackson pointed out in his dissent, if the Court were examining the permissibility of reimbursing children attending Catholic, but not other private, non-profit schools, then the police/fire services analogy would have cut the other way–the question would have been whether, for example, it would be permissible for the state to afford fire services to Catholic estab-

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[26] *Id.*

[27] *See id.* at 4 n.2.

[28] *See id.* It is also true, however, that there was nothing in the record establishing that there were no private, non-profit, non-Catholic schools. *See id.* at 62 (Rutledge, J., dissenting) ("There is no showing that there are no other private or religious schools in this populous district.").

[29] *See id.* at 21 (Jackson, J., dissenting) ("[T]he Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools.").

[30] *See id.* ("If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?").

lishments, but permit other religious establishments to burn.[31]

The *Everson* Court did not analyze whether it was constitutional for the state to reimburse transportation costs for Catholic schools in particular but, instead, whether the state's paying for the transportation costs of children attending religious schools violated the Establishment Clause. The Court offered a quick history of the Establishment Clause, observing that "dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters."[32] After noting that practices burdening dissenters "became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence,"[33] the Court explained that the people of Virginia, "as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[34] Here, too, a broad reading of the Court's language in *Everson* suggests strict separation between Church and State.

Yet, the Court's language regarding the taxing power might be given a much narrower interpretation. Just as the Court denied that a state was precluded from offering fire protection services to a religious school, the Court would also deny that a state was precluded from spending public funds to extinguish a fire in a chapel,[35] even though that would mean that public support (e.g., in the use of public equipment, the payment of fire personnel salaries, etcetera) was being expended to aid religion. Thus,

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[31] *See id.* at 25-26 ("Could we sustain an Act that said police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools . . . ?").

[32] *Id.* at 10 (majority opinion) (footnote omitted).

[33] *Id.* at 11.

[34] *Id.*

[35] *Cf.* William F. Cox, Jr., *The Original Meaning of the Establishment Clause and Its Application to Education*, 13 REGENT U. L. REV. 111, 115 (2000) ("[R]eligious institutions enjoy various government services such as fire protection . . . .").

when suggesting that "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church,"[36] the Court did not mean that the state was prohibited from spending monies in any way that might provide some benefit to a religious institution.

It is underappreciated that even Justice Rutledge rejected the robust claim that no tax monies could be expended in a way that would benefit religion–in his *Everson* dissent, he recognized that "the fire department must not stand idly by while the church burns."[37] Basically, he suggested that the "First Amendment does not exclude religious property or activities from protection against disorder or the ordinary accidental incidents of community life,"[38] arguing that the proper way to characterize the difference between the permissible and impermissible use of tax dollars to aid religion is that the First Amendment "forbids support, not protection from interference or destruction."[39]

Yet, Justice Rutledge seemed not to appreciate the potential difficulties in applying the distinction between support and protection. For example, the *Everson* Court implied that the bus transportation was being provided as a kind of safety measure, noting that:

> [S]tate-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare.[40]

Thus, the Court suggested, the provision of free transportation to schools should be viewed in the same light as the provision of policemen at a crosswalk. Yet, if indeed the transporta-

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[36] *Everson*, 330 U.S. at 16.

[37] *Id.* at 61 (Rutledge, J., dissenting).

[38] *Id.* at 61 n.56.

[39] *Id.*

[40] *See id.* at 17 (majority opinion).

tion reimbursement should be characterized as providing protection rather than support, that would make the program constitutionally permissible even according to Justice Rutledge's criterion.

At least one of the issues dividing the members of the *Everson* Court was whether the Court's characterization of the reimbursement as a safety measure was plausible. As Justice Jackson pointed out, "[a]ll school children are left to ride as ordinary paying passengers on the regular busses operated by the public transportation system."[41] Thus, it was not as if the town was taking measures to increase safety, e.g., by providing buses which had much better safety records than the buses that the children would otherwise have used. Instead, the Township would "at stated intervals . . . reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools."[42] Such an expenditure had "no possible effect on the child's safety or expedition in transit. As passengers on the public busses they travel as fast and no faster and are as safe and no safer."[43] Thus, according to Justice Jackson, the reimbursement at issue could not accurately be characterized as promoting safety if those monies could not plausibly be said to be contributing to the safety of the buses carrying the children.

Justice Jackson's point that reimbursement would not improve the safety of the children assumes that either (1) the children would ride the buses whether or not their parents were reimbursed, or (2) those who could not afford the cost of transportation in addition to the cost of tuition, books, etcetera simply would not attend the parochial school. The *Everson* majority seemed to be operating under a different assumption, namely, that at least some of the children who could not afford the cost of transportation in addition to the other expenses would hitchhike or walk to school if their parents were not reimbursed for transportation expenses.[44] If, indeed, offering the

[41] *Id.* at 20 (Jackson, J., dissenting).

[42] *Id.*

[43] *Id.*

[44] *See id.* at 7 (majority opinion) (arguing that the "same thing is no less true of leg

travel reimbursement would induce a significant number of children to ride buses rather than hitchhike or walk, and if indeed hitchhiking or walking to school was much more dangerous than riding buses, then the majority's characterization of the reimbursement as a safety measure was reasonable.

Regrettably, the *Everson* Court failed to cite any evidence that there was or would be a great deal of hitchhiking or walking along busy streets to be averted,[45] and failed to appreciate that offering the reimbursement might not have prevented those modes of transportation anyway. Because the reimbursement was not based on receipts or any other proof of the students' having used public transport but instead was based on attendance records at school,[46] it may be that those students (if any) who were hitchhiking or walking to school would still do so and the monies paid in "reimbursement" would be used to defray other costs.

The *Everson* Court concluded that the Establishment Clause did not prohibit "New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."[47] Of course, to reach that conclusion, the Court had to characterize the statute before it in a somewhat misleading way.[48] For example, the Court wrote

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islation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking'"). *See also* Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON INDEP. L. REV. 7, 21 (1993) ("The majority stressed that the public disbursement benefitted the children and their parents by enabling children to ride public buses safely rather than risk injury from walking and hitchhiking.").

[45] *Everson v. Bd. of Educ.*, 39 A.2d 75 (N.J. 1944), *rev'd* 44 A.2d 333 (N.J. 1945) (striking down the reimbursement). In dissent, Justice Heher made a vague allusion to the "traffic hazards incident to the journey, for which children are generally so ill-equipped." *See id.* at 77 (Heher, J., dissenting).

[46] *Everson*, 44 A.2d at 335 ("The payments to parents were in satisfaction of advancements made by them; and the amount was fixed upon the basis of the actual number of days' attendance as indicated upon each pupil's report card.").

[47] *Everson*, 330 U.S. at 17.

[48] *Cf. id.* at 19 (Jackson, J., dissenting) ("The Court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are in-

that the state "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[49] Yet, the program was general only in that it covered both public and Catholic schools.[50] Facially, it did not provide reimbursement for students attending non-Catholic religious schools, and thus *Everson* upheld a statute that facially distinguished among religions.[51]

In his *Everson* dissent, Justice Rutledge seemed to read the Establishment Clause prohibition quite broadly, suggesting that it "broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes."[52] He characterized the tax at issue as furnishing support for religion,[53] in that it helped children "in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching."[54] Indeed, he argued that "transportation, where it is

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escapable on the record.").

[49] *Id.* at 18 (majority opinion).

[50] *See supra* note 27 and accompanying text.

[51] *Cf. Everson*, 330 U.S. at 62 n.61 (Rutledge, J., dissenting)

> [I]t would seem that a statute, ordinance or resolution which on its face singles out one sect only by name for enjoyment of the same advantages as public schools or their students, should be held discriminatory on its face by virtue of that fact alone, unless it were positively shown that no other sects sought or were available to receive the same advantages.

Id.

Some commentators seem not to appreciate this aspect of *Everson*. *See, e.g.*, John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 289 (2001) ("*Everson* drew the line between permissible support for education and impermissible aid to religion very far to one side."). *See also* Carl H. Esbeck, *The 60th Anniversary of the* Everson *Decision and America's Church-State Proposition*, 23 J.L. & RELIGION 15, 31 (2007) ("It is little noted today that in *Everson*, freedom of choice for the intended beneficiaries of a *general* program of aid was upheld.") (emphasis added).

[52] *Everson*, 330 U.S. at 33 (Rutledge, J., dissenting).

[53] *Id.* at 44 ("Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own.").

[54] *Id.* at 45.

needed, is as essential to education as any other element"[55] and was no less essential to the educational process than was "the very teaching in the classroom or payment of the teacher's sustenance."[56] Because he viewed the provision of transportation as an essential factor in the religious education of these children, he believed that its provision could not pass constitutional muster.

Yet, Justice Rutledge's argument proved too much. The Court admitted the "possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State,"[57] i.e., that the state's providing the transportation might be a necessary condition for the children's attending the schools. But section (2) of the state ordinance would also have permitted some children to attend parochial school who otherwise would not have been able to do so. Thus, children living along a bus route who attended a parochial school along that bus route might not have attended the school if they had been forced to pay the transportation costs, even if the additional expenses incurred by the state by transporting these students for free was minimal. Presumably, Justice Rutledge did not think that the Constitution precluded a state from offering free transportation to children who lived along an existing bus route and who were going to a religious school along that route. The same point might be made about state funds that were provided so that parochial school children could receive lunch at school at a reduced price.[58] State subsidization of such meals might free up monies to be used for other expenses and, further, the students' being well-nourished might help them learn better,[59] which might be

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[55] *Id.* at 47.

[56] *Id.* at 48.

[57] *Id.* at 17 (majority opinion).

[58] *See* Ellen Fried & Michele Simon, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?*, 56 DUKE L.J. 1491, 1499 (2007) ("83 percent of all public and private schools participate in the NSLP [National School Lunch Program], and approximately 60 percent of children in those participating schools eat the NSLP lunch on a typical school day.").

[59] *Cf. Central Schools Hope Free Meals will Improve Test Scores*, ALBUQUERQUE

thought to be aiding church schools in their mission. Yet, presumably, Justice Rutledge would not have thought that providing lunches to needy children whether in public or private school (including religious schools) offends the Establishment Clause.[60] Indeed, although the provision of food to hungry children attending parochial schools might be characterized as support of religion, it might also be characterized as protecting the children from harm, which was the sort of state aid to religion that Justice Rutledge did not think precluded by the Establishment Clause.[61]

While sympathetic to the plight of parents wishing to send their children to religious schools,[62] Justice Rutledge believed that permitting a state to finance transportation would open the door to state financing of tuition or teachers' salaries. "No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educa-

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TRIB., May 22, 2000, at A2, *available at* 2000 WLNR 2209879 ("School officials hope the free meals program will boost test scores and improve attendance as well as provide nutritious breakfasts and lunches for the more than 7,000 students in the district's 17 schools.").

[60] *Cf.* Lemon v. Kurtzman, 403 U.S. 602, 616-17 (1971) ("Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.").

[61] *See supra* notes 37-39 and accompanying text.

[62] *Everson*, 330 U.S. at 58 (Rutledge, J. dissenting). In his dissent, Justice Rutledge noted:

> No one conscious of religious values can by unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not demand.

Id.

Cf. Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (Souter, J., dissenting) ("The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse.").

tional expense which others receive at public cost."[63] Yet, Justice Rutledge's argument that a state cannot justify refusing to pay parochial school tuition if paying for school transportation assumes that there is no principled way to distinguish between these expenses. If the reimbursement at issue is justifiable as a safety measure, and the Constitution permits a state to promote safety but not instruction in religious institutions, then Justice Rutledge's slippery slope claim is untenable. Indeed, he believed that a principled distinction could be made between the different types of expenses;[64] he just believed that this expense was more accurately characterized as promoting education than safety.[65]

Justice Jackson also dissented in *Everson*, suggesting that as a constitutional matter it makes no difference whether "the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school."[66] Under Justice Jackson's view, states cannot directly or indirectly support religious teaching. Yet, merely because a state is barred from supporting religious teaching does not mean that the state must also be barred from making religious schools safer for children.[67] Further, because Justice Jackson believed that the statute on its face benefited one religion in particular, he was not forced to confront a statute that offered benefits, perhaps indirectly, on a facially nondiscriminatory basis.

The issues dividing the *Everson* Court continue to divide the Court today.[68] For example, the members of the Court were divided about whether the use to which the monies had been allocated was itself constitutionally significant. Justice Rutledge believed this was irrelevant–the program was unconstitutional

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[63] *Everson*, 330 U.S. at 58 (Rutledge, J. dissenting).

[64] *See supra* note 39 and accompanying text.

[65] *See supra* notes 55-56 and accompanying text discussing how transportation is as necessary as books and other instructional materials.

[66] *Everson*, 330 U.S. at 24 (Jackson, J., dissenting).

[67] Given that Justice Jackson did not believe that the subsidy increased safety, *see supra* note 43 and accompanying text, it simply is not clear what he would have said had he believed that the state aid did in fact promote safety.

[68] *See infra* notes 386-89 and accompanying text comparing *Everson* with *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

because tax dollars were being used to support religion in that they were being used to help students receive religious instruction. It did not matter to him that the dollars themselves were not used to pay the teachers giving the instruction or to buy the books that would be used in class. The *Everson* majority emphasized that the monies were not being directly used for religious instruction. That was true in that (a) the monies were going to the parents rather than the schools, and (b) the reimbursement was for transportation costs rather than religious instruction.

A point that seems underappreciated is that the majority and dissent in *Everson* did not seem so far apart after all. Most if not all members of the Court believed that public expenditures to promote the safety of children in or on the way to/from religious settings are permissible,[69] and the disagreement was really about whether the expenditure at issue could accurately be characterized as promoting safety. Yet, if the reading of *Everson* offered here is correct, then the opinion is not as separationist as some commentators imply.[70] Nor is the opinion reasonably construed as standing for the proposition that because public funds can be used to protect or to prevent destruction, they can also be used to pay religious school tuition or parochial school teachers' salaries.[71]

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[69] Eight members of the Court signed onto either the majority opinion or Justice Rutledge's dissent, and both of those opinions suggested that the state expending money to promote the safety of religious institutions is permissible. While Justice Jackson did not sign onto Justice Rutledge's dissent, he did suggest that he generally concurred with Justice Rutledge's opinion. *See Everson*, 330 U.S. at 28 (Jackson, J., dissenting).

[70] *See* Eric R. Claeys, *Justice Scalia and the Religion Clauses: A Comment on Professor Epps*, 21 WASH. U. J.L. & POL'Y 349, 359 (2006) (discussing "the most extreme separationist claims one sees in *Everson*"); Edward J. Eberle, *Religion in the Classroom in Germany and the United States*, 81 TUL. L. REV. 67, 84 (2006) ("In *Everson*, all nine members of the Court employed separationist rhetoric, but the Court split 5-4 in applying the doctrine to the facts, upholding state-supported bussing of Roman Catholic schoolchildren."); Deverich, *supra* note 20, at 222 ("*Everson v. Board of Education* launched the modern Establishment Clause epoch in which courts adopted a strict separationist approach to church-state interaction by reference to Jefferson's formidable wall of separation.") (footnote omitted).

[71] *Cf. supra* note 63 and accompanying text discussing Justice Rutledge's dissent where he makes this suggestion.

B. No Support for the Teaching of Religion

The *Everson* Court upheld the statute before it because the funding was "so separate and so indisputably marked off from the religious function,"[72] that it could not plausibly be thought to be supporting religious teaching. At issue in *Board of Education v. Allen*[73] was a statute requiring local public school authorities to lend textbooks to all children in grades seven through twelve, whether those students were in public or private school.[74] The Court considered *Everson* "most nearly in point."[75] While recognizing that the line between neutrality towards and support of religion is not easy to draw,[76] the *Allen* Court employed the test announced in *School District v. Schempp*,[77] namely, that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[78] The Court suggested that the statute at issue had a secular purpose and a primary effect neither advancing nor inhibiting religion,[79] just as the law permitting the provision of bus transportation in *Everson* had a secular purpose and a primary effect that neither advanced nor inhibited religion.[80]

Yet, there are important differences between bus transportation on the one hand and the provision of books to students on the other. As the *Allen* Court recognized, "books are different from buses,"[81] and most "bus rides have no inherent religious significance."[82]

By discussing whether bus rides performed a religious function, the *Allen* Court shifted the focus away from the *Everson*

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[72] *Everson*, 330 U.S. at 18.
[73] 392 U.S. 236 (1968).
[74] *Id.* at 238.
[75] *Id.* at 241-42.
[76] *Id.* at 242.
[77] 374 U.S. 203 (1963).
[78] *Id.* at 222 (citing *Everson*, 330 U.S. 1 (1947)).
[79] *Allen*, 392 U.S. at 243.
[80] *See id.*
[81] *Id.* at 244.
[82] *Id.*

Court criterion, namely, whether the aid was promoting health and safety rather than education, to whether the aid had religious significance.[83] This shift was important because it allowed the Court to distinguish the aid in *Allen* from other kinds of impermissible support by noting that the books at issue in this case had no religious significance either,[84] since they had to be approved by public school authorities and only secular books would receive the necessary approval.[85] Now the focus of discussion was not on whether books were more aptly characterized as promoting education rather than health and safety but, instead, on whether the public officials in charge of making the selection would be "unable to distinguish between secular and religious books"[86] or whether they would surreptitiously approve religious books as texts.[87]

The appellants had claimed that textbooks, unlike buses, are central to the teaching process, and that the state could not offer support for something central in providing a religious education.[88] The Court rejected that argument, suggesting that parochial schools provide "religious instruction and secular education."[89] Given these different functions performed by parochial schools and the Court's unwillingness to accept "that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact

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[83] *See* Donald A. Giannella, Lemon *and* Tilton*: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 148 (1971) ("In *Everson*, the Court purported to draw the line at public welfare benefits, clearly excluding educational aids."). The claim here is not that the presumed *Everson* criterion would solve all difficulties—it would not be clear, for example, whether to classify a class on health and safety as "promoting health and safety," as "educational," or as both. The claim is merely that the Court has shifted the focus away from what had been considered important in the case that was most nearly on point.

[84] *See Allen*, 392 U.S. at 244 (noting that the statute "does not authorize the loan of religious books").

[85] *Id.* at 244-45.

[86] *Id.* at 245.

[87] *Id.*

[88] *Id.* ("The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion.").

[89] *Id.*

instrumental in the teaching of religion,"[90] the Court held that provision of these textbooks did not violate the Establishment Clause.[91]

The *Allen* Court did not state which of two possible positions it was maintaining: (1) state aid to parochial schools is permissible unless it can be shown that the aid will in fact support religious teaching, or (2) because the Court found it implausible that secular texts could be used to promote religion, the Court would only strike use of public monies to buy secular textbooks if it could be shown that the books were in fact being used to support religion. The first position imposes a heavy burden as a general matter on those challenging state support of religious institutions, whereas the second imposes a heavy burden on those challenging state support of religion only where the supported activity is itself quite secular in nature.[92]

There were three dissents in *Allen*, two questioning whether the approved texts would in fact be secular and one questioning the Court's reading of *Everson*. Justice Douglas worried in his dissent that "[a] parochial school textbook may contain many, many more seeds of creed and dogma than a prayer,"[93] pointing out as an example a general science text that distinguished among animal and human embryos by noting that the latter "'has a human soul infused into the body by God."[94] Because the textbook plays such a central role in religious education,[95] and can be so central in teaching aspects of a religious creed,[96] Justice Douglas suggested that the Constitution could

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[90] *Id.* at 248.

[91] *Id.*

[92] The plurality in *Mitchell v. Helms*, 530 U.S. 793 (2000), would impose an even heavier burden on those challenging sectarian aid, arguing that the Establishment Clause is not violated as long as the aid is secular and generally available. *See infra* notes 353-74 and accompanying text discussing *Helms*, 530 U.S. 793.

[93] *Allen*, 392 U.S. at 257 (Douglas, J., dissenting).

[94] *Id.* at 258 (quoting from JOHN M. SCOTT, ADVENTURES IN SCIENCE 618-19 (1963)).

[95] *Id.* at 257 (noting "[t]he textbook goes to the very heart of education in a parochial school").

[96] *Id.* (describing it as "the chief, although not solitary, instrumentality for propagating a particular religious creed or faith").

not possibly permit the aid in question.[97] Justice Fortas had related concerns, pointing out that the program at issue did not simply involve the approval of textbooks that would be used in both public and private schools.[98] Rather, the books were chosen by sectarian authorities specifically for the children attending their parochial schools.[99] Thus, he suggested, because "the books furnished to students of sectarian schools are selected by the religious authorities and are prescribed by them," the statute did not fall within the area protected by *Everson*[100] and had to be struck down as a violation of Establishment Clause guarantees.[101] However, the Court was not convinced that sectarian texts would in fact be approved,[102] and so was unpersuaded by Justices Douglas's and Fortas's points.

Justices Douglas and Fortas worried that (1) the actual choice of the textbooks might be affected by virtue of their being used in parochial schools, and (2) texts incorporating subtle or not-so-subtle religious views might be chosen. Justice Black made a different but related point when suggesting that the texts, "although 'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect."[103] The Court disagreed that it was inevitable that the secular texts would be so used,[104] however, and rejected that the statute should be struck down without more of a showing that the state aid was actually promoting religion.

Justice Black made another point in his *Allen* dissent, disagreeing with the majority's implicit reading of *Everson* and suggesting instead that the law at issue in *Everson*

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[97] *See id.*

[98] *Id.* at 271 (Fortas, J., dissenting) (noting that the program was "not one in which all children are treated alike, regardless of where they go to school").

[99] *Id.* ("This program . . . is hand-tailored to satisfy the specific needs of sectarian schools. Children attending such schools are given *special* books—books selected by the sectarian authorities.").

[100] *Id.* ("This case is not within the principle of Everson v. Board of Education.").

[101] *Id.* ("How can this be other than the use of public money to aid those sectarian establishments?").

[102] *See supra* notes 85-87 and accompanying text.

[103] *Allen*, 392 U.S. at 252 (Black, J., dissenting).

[104] *See supra* notes 84-91 and accompanying text.

> was treated in the same way as a general law paying the streetcar fare of all school children, or a law providing midday lunches for all children or *all school children*, or a law to provide police protection for children going to and from school, or general laws to provide police and fire protection for buildings, including, of course, churches and church school buildings as well as others.[105]

Thus, Justice Black explained that the bus service, upheld in *Everson*, was analogous to the provision of police protection for children going to and from school, which is distinguishable in kind from providing money for books, tuition, or teacher salaries.

A few points might be made about Justice Black's *Everson* analysis. First, given that he authored the opinion, his interpretation of it is due some deference, at least with respect to the distinction that the opinion was trying to draw. Second, his interpretation of *Everson* as approving a safety measure both underscores that members of the Court may have been less far apart in their view of what the Establishment Clause permits than is commonly supposed[106] and suggests that if the result in *Allen* was dictated by *Everson*,[107] the decision should have come out the other way—it would have been rather difficult, indeed, to argue plausibly that the provision of textbooks promoted safety rather than instruction.

Allen modified the relevant criterion from "Is the program receiving state support a health/safety measure rather than instructional?" to "If the program receiving state support is instructional, is the instruction secular?" To answer whether the instruction was secular, the Court considered among other things the nature of the materials.

That the texts were secular in nature was helpful, although not dispositive, in establishing that the texts would not be used

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[105] *Allen*, 392 U.S. at 252 (Black, J., dissenting).

[106] *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 39 (2006) (describing the *Everson* dissent as "more stridently separationist" than the majority opinion).

[107] *See supra* note 75 and accompanying text suggesting that the *Allen* Court implied that *Everson* was virtually dispositive.

to promote religious instruction. Presumably, had the Court accepted Justice Black's claim that the secular materials inevitably would have been used to promote religion,[108] it would have struck down the use of the public funds to buy such secular materials—else, there would have been no need for the Court to have discussed the dual functions of parochial education.[109] Nonetheless, one infers, because of the secular nature of the textbooks at issue, the Court believed it reasonable to assume that the books would be used to promote secular learning and was unworried by the bare possibility that such texts could be used to promote religious views.

Echoing Justice Rutledge's warning in his *Everson* dissent that the majority opinion was opening the door to a variety of kinds of support for religious institutions,[110] Justice Black warned in his *Allen* dissent that the majority opinion could be used to justify state support of religious schools in other ways. "It requires no prophet to foresee that on the argument used to support this law others could be upheld providing . . . to pay the salaries of the religious school teachers . . . ."[111] That very issue was addressed in *Lemon v. Kurtzman*.[112]

C. State Augmentation of Religious Teachers' Salaries

Lemon involved a challenge to Pennsylvania and Rhode Island statutes providing support to sectarian elementary and secondary schoolteachers.[113] The Rhode Island Act supplemented teacher salaries by 15% based on a legislative finding that "the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers."[114] The only teachers eligible for these supplements were those who (a)

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[108] *See supra* note 103 and accompanying text.

[109] *See supra* note 89 and accompanying text.

[110] *See supra* note 63 and accompanying text.

[111] *Bd. of Educ. v. Allen*, 392 U.S. 236, 253 (Black, J., dissenting).

[112] 403 U.S. 602 (1971).

[113] *See id.* at 606-07.

[114] *Id.* at 607.

only taught subjects offered in the public schools,[115] (b) only used teaching materials available in the public schools,[116] and (c) agreed in writing not to teach religion while receiving any salary supplement under the Act.[117] The Pennsylvania statute authorized reimbursement of "nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials."[118] Reimbursement was limited to those teaching certain courses,[119] and the textbooks and instructional materials had to be approved by the State Superintendent of Public Instruction.[120] There would be no reimbursement for any course containing "'any subject matter expressing religious teaching, or the morals or forms of worship of any sect.'"[121] Thus, just as the only textbooks that could receive state funding in *Allen* were books that were secular in content, the only teachers whose salaries would be supplemented in *Lemon* were those teaching secular subjects.

The *Lemon* Court began its analysis by offering "the cumulative criteria developed by the Court over many years":[122]

(1) "the statute must have a secular legislative purpose,"[123]

(2) "its principal or primary effect must be one that neither advances nor inhibits religion,"[124] and

(3) "the statute must not foster 'an excessive government entanglement with religion.'"[125]

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[115] *Id.* at 608.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 609.

[119] *Id.* at 610 ("Reimbursement is limited to courses 'presented in the curricula of the public schools.' It is further limited 'solely' to courses in the following 'secular' subjects: mathematics, modern foreign languages, physical science, and physical education.").

[120] *Id.*

[121] *Id.* (quoting PA. STAT. ANN. §§5601-5609 (Supp. 1971)).

[122] *Id.* at 612.

[123] *Id.*

[124] *Id.* (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

[125] *Id.* at 613 (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The *Lemon* test has been extensively criticized. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in

The Court then applied the criteria to the statutes before it. The Court accepted that the purpose behind the legislation was secular—to enhance the quality of secular education in all schools[126] —but did not decide whether the principal and primary effect of the statute was to promote religion,[127] instead suggesting that the legislatures' attempts to assure that only secular education was receiving support[128] resulted in the violation of the excessive entanglement prong.[129]

The excessive entanglement prong was violated because of the necessity of maintaining continuing supervision of the teachers to assure that they would not be engaging in sectarian teaching while receiving state support. The Court made clear that although the states could provide aid to religious schools

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its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . ."); *id.* at 399 ("For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."). Indeed, the decision may be overruled by the current Court. *See* Erwin Chemerinsky, *The Future of Constitutional Law*, 34 CAP. U. L. REV. 647, 665 (2006) ("But both Chief Justice Roberts and Justice Alito are very likely votes to overrule the *Lemon* test and join with Justices Scalia, Kennedy, and Thomas in adopting a view that the government violates the Establishment Clause only if it literally establishes a church or coerces religious participation."). Nonetheless, it remains the law of the land and was used in 2005 to strike down a posting of the Ten Commandments in *McCreary County v. ACLU*, 545 U.S. 844 (2005). "Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction." *Id.* at 881. Ironically, the Court did not even use the test when upholding a posting of the Ten Commandments in *Van Orden v. Perry*, 545 U.S. 677 (2005). The plurality instead claimed that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *Id.* at 686.

[126] *Lemon*, 403 U.S. at 613.

[127] *Id.* at 613-14 ("We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses . . . .").

[128] *See id.* at 613 ("The two legislatures . . . . have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.").

[129] *Id.* at 614 ("[W]e conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.").

with respect to neutral materials, facilities, or services[130]—for example, the provision of transportation, school lunches, public health services, and secular textbooks were all permissible[131]—the aid at issue in *Lemon* was of a different sort. Teachers are quite different from books,[132] since it is much easier to tell whether a particular book's content includes religious matters than it is to predict whether a teacher's handling of a particular subject will include religious matters.[133]

The *Lemon* Court was not assuming that parochial school teachers would act in bad faith or attempt to circumvent constitutional limitations,[134] but merely noted that a teacher might have some difficulty in completely separating secular and religious teaching.[135] This was in part a function of the different perspectives that individuals might have with respect to particular course contents, since what might "appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion."[136]

To avoid even inadvertent state support of sectarian teaching, the state would be forced to monitor the classrooms.[137] After all, the Court noted, "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."[138] Yet, the *Lemon* Court did not explore whether its observations about teachers would have any implications for its prior approval of secular texts, which would be used by the very teachers whom the Court believed

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[130] *Id.* at 616.

[131] *Id.* at 616-17.

[132] *Id.* at 617.

[133] *See id.* ("In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.").

[134] *Id.* at 618.

[135] *Id.* at 618-19.

[136] *Id.* at 619.

[137] *Id.* ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected.").

[138] *Id.*

had to be under continuing surveillance. Even a close and careful inspection of a book could not reveal how it would be used in class.[139] The *Lemon* rationale for striking down salary augmentation of parochial school teachers for fear that a state would thereby be unwittingly supporting the inculcation of religious doctrine would also suggest that a state should not provide even secular books for fear of how they would be used.[140]

The *Lemon* Court noted an additional defect in the Pennsylvania statute, namely, that the monies were given directly to the schools.[141] This was a concern because the "government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between Church and State."[142] Continuing contact creates an opportunity for constitutional mischief because, for example, the government might pressure a school to modify its curriculum to achieve more secular aims.[143]

Yet, by noting some of the *additional* difficulties associated with a direct grant to sectarian institutions, for example, that a continuing and intimate relationship between Church and State can cause "political division along religious lines,"[144] the *Lemon* Court was not implying that indirectly funneling funds to religious schools somehow should or would immunize the grant from constitutional review.[145] Whether the allocation at issue

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[139] *Cf.* Mitchell v. Helms, 530 U.S. 793, 823 (2000) ("Although it might appear that a book, because it has a pre-existing content, is not divertible, and thus that lack of divertibility motivated our holding in *Allen*, it is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message.").

[140] *Cf. infra* note 216 and accompanying text discussing the Court's recognition of the tension between how it treats the constitutionality of programs involving texts versus other kinds of secular materials.

[141] *Lemon*, 403 U.S. at 621 ("The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related schools.").

[142] *Id.* at 621-22.

[143] *Cf.* Wolman v. Walter, 433 U.S. 229, 266 n.7, (1977) (Stevens, J., concurring in part & dissenting in part) ("[S]ectarian schools will be under pressure to avoid textbooks which present a religious perspective on secular subjects, so as to obtain the free textbooks provided by the State.").

[144] *Lemon*, 403 U.S. at 622.

[145] *See infra* note 272 and accompanying text suggesting that indirect funding some-

involves a single contact or instead continual interaction, a state still must fulfill its constitutional obligations under the Establishment Clause, which might well necessitate making decisions about what counts as religious and what does not.[146] While such decisions may not necessitate continuing and intimate relationships between Church and State, they nonetheless must still be made. Both *Everson* and *Allen* were predicated on the secular nature of that which was funded—had the fact that the monies were not directly going to the schools immunized the funding from further constitutional review, there would have been no need for an analysis of whether the funds were supporting something secular rather than sectarian.[147]

That aid is not immunized merely because it goes indirectly to religious schools is illustrated in *Committee for Public Education & Religious Liberty v. Nyquist*.[148] The *Nyquist* Court examined a New York program that would partially reimburse low-income parents if they sent their children to private schools,[149] and that would also pay monies directly to private schools for facilities maintenance and repair based on the number of students in attendance.[150] Few if any restrictions were placed on which

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how immunizes a grant from constitutional review.

[146] *Cf.* Aguilar v. Felton, 473 U.S. 402, 413 (1985) *overruled by* Agostini v. Felton, 521 U.S. 203 (1997) ("Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes. . . . In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a 'religious symbol' and thus off limits in a Title I classroom.").

[147] So, too, in *Levitt v. Committee for Public Education & Religious Liberty*, the Court struck down a New York statute reimbursing private schools for examination expenses, precisely because of "the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." 413 U.S. 472, 480 (1973).

[148] 413 U.S. 756 (1973).

[149] *Id.* at 780.

[149] *Id.* ("The state program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation. To qualify, a parent must have earned less than $5,000 in taxable income and must present a receipted tuition bill from a nonpublic school.").

[150] *Id.* at 774 ("The 'maintenance and repair' provisions of § 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low-

facilities would be maintained or repaired with these monies.[151] The state justified these expenditures by noting that the public schools would be massively overburdened were all those children currently attending private schools to start attending public schools instead.[152] The Court struck down *both* types of aid because "neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools."[153] Thus, the fact that the reimbursement was going to low-income families rather than the schools themselves did not immunize the funding from further constitutional review.

The *Nyquist* Court noted another difficulty with the way the New York system had been set up, namely, that the "tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools."[154] While refusing to hold that this factor alone was dispositive to establish the unconstitutionality of the program, thereby indicating that another program without the other defects in the New York program would still be unconstitutional if giving this benefit solely to parents of children attending sectarian schools,[155] the Court nonetheless suggested that it was a separate factor militating against the constitutionality of the statute at issue.[156] The *Nyquist* Court made clear that had the benefit to religious institu-

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income areas. The grants, total[] $30 or $40 per pupil depending on the age of the institution . . . .").

[151] *Id.* ("The grants . . . are given largely without restriction on usage.").

[152] *Id.* at 765 ("Turning to the public schools, the findings state that any 'precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs,' an increase that would 'aggravate an already serious fiscal crises in public education' and would 'seriously jeopardize quality education for all children.' Based on these premises, the statute asserts the State's right to relieve the financial burden of parents who send their children to non-public schools through this tuition reimbursement program. Repeating the declaration contained in § 1, the findings conclude that '(s)uch assistance is clearly secular, neutral and nonideological.'") (alteration in original) (footnote omitted).

[153] *Id.* at 794.

[154] *Id.*

[155] *Id.* (refusing to intimate "whether this factor alone might have controlling significance in another context in some future case").

[156] *Id.* ("[I]t should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor.").

tions only been indirect and incidental, the Court would have upheld the statute,[157] but this statute could not pass muster.

In *Everson*, *Allen*, *Lemon*, and *Nyquist*, the Court offered some "guidelines"[158] with respect to the kinds of state aid to religious institutions that will pass constitutional muster. The Court in *Everson* and *Allen* suggested that secular aid is permissible, but suggested in *Nyquist* and *Lemon* that aid that is too readily divertible to promote sectarian instruction is impermissible. These guidelines do not set "precise limits,"[159] but, instead, leave a large gray area, as was illustrated in *Meek v. Pittenger*.[160]

At issue in *Meek* was a Pennsylvania statute authorizing the provision to students in nonpublic primary and secondary schools of:

(1) auxiliary services[161]
(2) textbooks[162]
(3) instructional materials[163] and equipment[164]

The Court examined the provision of each of these in light of the *Lemon* test.[165]

The Court upheld the loaning of the textbooks, citing *Al-*

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[157] *Id.* at 775 (noting that "an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law").

[158] *See* Meek v. Pittenger, 421 U.S. 349, 359 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

[159] *Id.*

[160] *Id.*

[161] *Id.* at 353 ("Auxiliary services [were defined to] include counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, 'and such other secular, neutral, nonideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.").

[162] *See id.* at 353-54.

[163] *Id.* at 354-55 ("'Instructional materials' [were] defined to include periodicals, photographs, maps, charts, sound recordings, films, 'or any others printed and published materials of a similar nature.'").

[164] *Id.* at 355 ("'Instructional equipment' . . . include[d] projection equipment, recording equipment, and laboratory equipment.").

[165] *Id.* at 358.

len,[166] and noted that the textbooks were secular and would be used for purely secular purposes.[167] The Court emphasized that the textbooks were loaned directly to the student,[168] and reasoned that the financial benefits were therefore to the "parents and children, not to the nonpublic schools."[169]

Yet, there was reason to question whether the books were really loaned to the students in more than a merely formal sense. As Justice Brennan pointed out in his concurrence and dissent, it was "pure fantasy to treat the textbook program as a loan to students,"[170] because "virtually the entire loan transaction [was] . . . conducted between officials of the nonpublic school, on the one hand, and officers of the State, on the other."[171] Further, the loaned textbooks were stored on-campus.[172] Finally, while the books were sometimes described as being loaned to the students, at other times they were described as being loaned to the schools themselves, for example, when discussing when the books were to be presumed lost, obsolete, or worn out.[173] That said, however, the arrangement at issue in *Meek* was similar to the arrangement whose constitutionality was upheld in *Allen*,[174] and it presumably would have been difficult to justify striking down the loan program at issue in

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[166] *See id.* at 362 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 244-45 (1968)).

[167] *See id.*

[168] *See id.* at 361.

[169] *Id.*

[170] *Id.* at 379 (Brennan, J., concurring in part & dissenting in part).

[171] *Id.* at 380.

[172] *See id.* at 361 n.9 (majority opinion); *id.* at 379 (Brennan, J., concurring in part & dissenting in part).

[173] *See id.* at 380-81 (Brennan, J., concurring in part & dissenting in part) ("Indeed, the Guidelines make no attempt to mask the true nature of the loan transaction. In explicit words § 4.10 describes the transaction: 'Textbooks *loaned to the nonpublic schools:* (a) shall be maintained on an inventory by the nonpublic school.' Section 4.11 provides: 'It is presumed that textbooks on *loan to nonpublic schools* after a period of time will be lost, missing, obsolete or worn out. This information should be communicated to the Department of Education. After a period of six years, textbooks shall be declared unserviceable and the disposal of such shall be at the discretion of the Secretary of Education.'").

[174] *See id.* at 362 (majority opinion) ("In sum, the textbook loan provisions of Act 195 are in every material respect identical to the loan program approved in *Allen*.").

Meek without overruling *Allen*.[175]

One of the surprising aspects of *Meek* was the degree to which the Court emphasized the importance of the identity of the individuals receiving the loans. Consider the *Meek* Court's analysis of the constitutionality of the program whereby instructional equipment and materials were loaned directly to the schools rather than to the pupils.[176] Doing so, the Court reasoned, had the "unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."[177] Yet, it is not clear how the loan of the instructional materials and equipment significantly advanced religion in a way that the loan of the books did not.

It might be argued that the instructional materials and equipment might be diverted to religious uses in a way that the secular books could not, and that this is why the loan of the latter was constitutional but the former was not. But that was not the reasoning of the Court. The *Meek* Court accepted the district court's conclusion that "the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are 'self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use.'"[178] Nonetheless, the Court reasoned that "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary

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[175] Justice Brennan tried to distinguish the two cases. *See, e.g.*, *id.* at 379 (Brennan, J., concurring in part & dissenting in part) ("The Commonwealth has promulgated 'Guidelines for the Administration of Acts 194 and 195' to implement the statutes. These regulations, unlike those upheld in *Allen*, constitute a much more intrusive and detailed involvement of the State and its processes into the administration of nonpublic schools."); *id.* at 383 ("[U]nlike the New York statute in *Allen* which extended assistance to all students, whether attending public or nonpublic schools, Act 195 extends textbook assistance only to a special class of students, children who attend nonpublic schools which are, as the plurality notes, primarily religiously oriented.").

[176] *See id.* at 362-63 ("Although textbooks are lent only to students, Act 195 authorizes the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools in the Commonwealth.").

[177] *Id.* at 363.

[178] *Id.* at 365 (alteration in original) (quoting Meek v. Pittinger, 374 F. Supp. 639, 660 (E.D. Pa. 1974), *aff'd in part, rev'd in part*, 421 U.S. 349 (1975)).

schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian."[179] Yet, this analysis has implications, which the Court failed to take into account. Basically, the Court suggested that even secular materials will promote sectarian ends if used within pervasively sectarian institutions. But the same point might be made about texts,[180] namely, even secular texts might be used to promote sectarian ends if used within pervasively sectarian institutions.[181]

A separate issue addressed by the Court involved how to characterize the loan. Rather than suggest that ownership of the loaned materials remained with the state,[182] the Court instead discussed "the substantial amounts of direct support authorized by Act 195," [183] as if the loans of the equipment were instead cash that had been given directly to the religious institutions. While accepting that the aid could only be used for "secular purposes,"[184] the Court nonetheless concluded that "'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion."[185] Yet, money was not flowing to these institutions. While the institutions were receiving the benefits involved in having instructional materials and equipment loaned to them so that, for example, these goods would not have to be purchased and the saved monies might be used for other purposes, an analogous claim might have been made about the

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[179] *Id.*

[180] Indeed, it was made in Justice Black's *Allen* dissent. *See supra* note 103 and accompanying text.

[181] *Cf.* Mark J. Chadsey, *State Aid to Religious Schools: From* Everson *to* Zelman *a Critical Review*, 44 SANTA CLARA L. REV. 699, 724 (2004) ("If textbooks are not converted to a religious purpose merely because they are delivered to schools in which religion is so ubiquitous that a significant percentage of its function is subsumed in the religious mission, then certainly neither are instructional materials.").

[182] *Cf. Meek*, 421 U.S. at 360 (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)) ("Books are furnished at the request of the pupil and ownership remains, at least technically, in the State.").

[183] *Id.* at 365.

[184] *Id.* at 366.

[185] *Id.* (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

loaned books.

Had the equipment not been loaned, the schools presumably would have been forced to buy that equipment and at least some of those costs would have been passed on to the students and their families. Had the books not been loaned, the students would have been forced to buy them. But the schools might then have been forced to bear some of those costs, for example, by being forced to lower tuition or reduce other fees. Or, in the alternative, if the textbooks were loaned, the schools might have been able to charge more in tuition or fees, and the families who did not have to spend money on the books might now be able to afford to pay additional fees to the schools. There is no reason to think that the loan of the equipment benefited only the schools and not in addition the families of those attending the schools, just as there is no reason to think that the loan of the textbooks was only a financial boon for the students' families and not the schools.

Suppose that the instructional equipment and materials had been loaned to the student body with the understanding that the equipment and materials would be stored and used at the school. The equipment would be used for the students' benefit, and some of the materials such as maps might even be permitted to leave the school under appropriate circumstances. The *Meek* Court's analysis suggests that this formal maneuver might well have made the difference with respect to the program's constitutionality, even though the schools would have received the same functional benefits whether the equipment was loaned in name to the students or instead to the schools.

It may well be that the *Meek* Court is less appropriately subject to criticism for upholding the loaning of books containing maps while at the same time striking down the loaning of maps[186] than for its apparent willingness to uphold or not up-

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[186] *See* James R. Beattie, Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill*, 43 CATH. LAW. 367, 398 n.131 (2004) ("Government may fund the costs of books for parochial school students. *See* Bd. of Educ. v. Allen. Yet it cannot cover the costs of maps. *See* Meek v. Pittenger.") (citations omitted). Basically, the Court may have been trying to cabin *Allen*'s ruling upholding the state provision of books to sectarian schools by refusing to uphold the state provi-

hold the loan of school materials based on the formal identity of the loan recipient. Such a method of distinguishing is likely to yield absurd results[187] and, further, would seem open to a variety of kinds of abuse.[188]

The *Meek* Court also examined whether auxiliary services could be provided without offending the Constitution. The Court explained that the district court had "emphasized that 'auxiliary services' are provided directly to the children involved and are expressly limited to those services which are secular, neutral, and nonideological,"[189] thus making these services seem analogous to the loaned texts whose constitutionality had been upheld. However, the *Meek* Court chided the district court for "relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained."[190] Like the *Lemon* Court,[191] the *Meek* Court worried that teachers in religious schools might inadvertently include religious teaching within their secular instruction,[192] and also worried that those providing auxiliary services at pervasively sectarian schools might feel pressured to promote religion,[193] which would necessitate states maintaining continual surveillance to make sure that this perceived pressure did not result in

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sion of other kinds of secular materials to sectarian schools. *See infra* notes 216-19 and accompanying text.

[187] *See infra* notes 205-08 and accompanying text discussing *Wolman*'s rejection of that formal approach.

[188] *Cf. infra* note 272 and accompanying text discussing the immunizing effect of directing funds for parochial schools through the students' families.

[189] *Meek*, 421 U.S. at 368.

[190] *Id.* at 369.

[191] *See supra* notes 134-36 and accompanying text.

[192] *Meek*, 421 U.S. at 370-71. The Court stated:

> Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient . . . .

Id.

[193] *Id.* at 371.

religious instruction.[194] In short, the *Meek* Court upheld the practice that had already been upheld in *Allen*, but struck down the remaining provisions, notwithstanding the Court's professed confidence that the materials, equipment, and services at issue were secular and would not be put to sectarian uses.

Meek left open a variety of questions whose answers were clarified in *Wolman v. Walter*.[195] At issue in *Wolman* were appropriations by the Ohio Legislature whereby various books, materials, and services could be provided to both public and private school students.[196] The *Wolman* Court followed *Allen* and *Meek* and upheld Ohio's textbook loan program,[197] and also upheld appropriations for various kinds of services involving speech, hearing, and psychological diagnosis and treatment.[198] Those of the services that would be performed on-site[199] were unlikely to provide an opportunity for the promotion of sectarian views,[200] and other services involving a greater risk of the com-

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[194] *Id.* at 372.

[195] 433 U.S. 229 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

[196] *Id.* at 234 ("All disbursements made with respect to nonpublic schools have their equivalents in disbursements for public schools, and the amount expended per pupil in nonpublic schools may not exceed the amount expended per pupil in the public schools.").

[197] *Id.* at 237-38 ("This system for the loan of textbooks to individual students bears a striking resemblance to the systems approved in *Board of Education v. Allen* and in *Meek v. Pittenger*.") (citations omitted); *see also id.* at 255 ("[W]e hold constitutional those portions of the Ohio statute authorizing the State to provide nonpublic school pupils with books.").

[198] *See id.* at 241-42.

[199] *Id.* at 241 ("It will be observed that these speech and hearing and psychological diagnostic services are to be provided within the nonpublic school.").

[200] *Id.* at 244. The Court explained:

> The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

Id.

munication of sectarian views would be provided off-site.[201] Given that the personnel providing these off-site services[202] were either under contract with the state health department or were employed by the local board of education,[203] the Court did not believe that there was a great risk that these individuals would engage in sectarian instruction.[204]

The *Wolman* Court explained that the Ohio program did not have the constitutionally worrisome features of the auxiliary services program at issue in *Meek*, which had been struck down because of the danger that "arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school."[205] The important consideration involved the environment in which the services would be offered,[206] and as "long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise."[207] Because in *Wolman* those services that had the potential to involve sectarian instruction were offered off-site and those provided on-site did not have that potential, the Court held that there was insufficient likelihood that the state would be promoting sectarian education through its funding of any of the services at issue and thus found no violation of the Establishment Clause.[208]

Wolman made clear that the Court was willing to look past the formal identity of the loan recipients when considering whether aid to sectarian schools violated Establishment Clause guarantees, striking down the Ohio materials/equipment loan program as an attempt to do an end-run around the constitu-

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[201] *Id.* at 247.

[202] *Id.* at 245 ("The services are to be performed only in public schools, in public centers, or in mobile units located off the nonpublic school premises.").

[203] *See id.*

[204] *See id.* at 247-48.

[205] *Id.* at 247 (citing Meek v. Pittenger, 421 U.S. 349, 371 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793, 808 (2000)).

[206] *Id.* ("The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course.").

[207] *Id.*

[208] *See id.* at 244, 248.

tional requirements. The Court noted, "Before *Meek* was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of *Meek*, the state legislature decided to channel the goods through the parents and pupils."[209] Rejecting the legislature's move attempting to save the program, the Court explained that while there had been a "technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises."[210]

By emphasizing the history of the program, the Court made clear that it would not permit states to do an end-run around their constitutional obligations.[211] Yet, the *Wolman* Court did not thereby resolve all relevant issues. For example, it is not clear what the Court would have said if Ohio had initially loaned these materials directly to the students or if a period of years had elapsed between the ending of the program involving loans to the schools and the beginning of the new program involving loans directly to the students.[212]

When striking down the material/equipment loan program,

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[209] *Id.* at 250.

[210] *Id.*

[211] *See id.*; *cf.* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522 (4th Cir. 1999) (citing Hustler Magazine v. Falwell, 485 U.S. 46 (1988)) ("We believe that such an end-run around First Amendment strictures is foreclosed by *Hustler*").

A separate question is whether the Ohio Legislature was trying to do an end-run around the Constitution or, instead, was modifying the program to be in accord with constitutional requirements.

[212] *Cf.* McCreary County v. ACLU, 545 U.S. 844, 873-74 (2005). The Court in this case addressed the relevancy of past actions:

> In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense. It is enough to say here that district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions.

Id.

the *Wolman* Court analogized these loans to the grants at issue in *Nyquist* and suggested that the Ohio loans were more clearly unconstitutional than the New York grants.[213] The Court reasoned that the New York grants could be used by the parents in any way they wanted and thus might not "end up in the hands of the religious schools,"[214] whereas the loaned materials and equipment in *Wolman* had to "be used to supplement courses."[215] The Court thus suggested that the fact that the benefit was restricted in that it had to be used in a way connected to a sectarian institution was itself constitutionally significant.

By arguing that the required tie between the courses and the loaned materials/equipment militated in favor of the program's unconstitutionality, the *Wolman* Court was implicitly undercutting the constitutionality of the textbook loan program, because the use of the textbooks was also tied to courses. The Court appreciated this implication,[216] but upheld the textbook loan provision as a matter of *stare decisis*.[217] The Court then explained that it was refusing to extend *Allen*,[218] and struck down both the equipment loan provision and a provision which funded field trips.[219]

In the series of cases discussed above, the Court at least seemed to have adopted a relatively consistent approach. The Court would approve programs permitting the provision of secu-

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[213] *See Wolman*, 433 U.S. at 251 n.17 (citing Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)) ("In many respects, *Nyquist* was a more difficult case than the present one.").

[214] *Id.*

[215] *Id.*

[216] *See id.* at 251 n.18 ("There is, as there was in *Meek*, a tension between this result and *Board of Education v. Allen*.") (citation omitted).

[217] *See id.* ("*Board of Education v. Allen* has remained law, and we now follow as a matter of stare decisis the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes.").

[218] *See id.* ("When faced, however, with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles announced in our subsequent cases, we choose the latter course.").

[219] *See id.* at 251. "[F]ield trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct." *Id.* at 254.

lar services if those services did not pose a risk of sectarian instruction[220] or, where there was such a risk, if those services were not provided on-site. The Court would approve provision of secular texts in sectarian schools, but would likely not approve the provision of other kinds of materials, even if secular. This approach was continued in the 1980s, with at least one important modification.

III. THE NEW TAKE ON NEUTRALITY

In the 1980s, there was no wholesale revision of the jurisprudence with respect to what was permissible state aid to primary and secondary sectarian institutions. Rather, there was a change in one area of this jurisprudence that, when coupled with some developments in other areas of the law, had important implications in the 1990s. Those changes culminated in the current jurisprudence regarding aid to sectarian primary and secondary schools. Regrettably, the new jurisprudence simply is not reconcilable with either the letter or the spirit of *Everson*.

A. Reimbursing Families for Parochial School Expenses

As discussed above,[221] the *Nyquist* Court struck down a New York plan to offer grants to low-income families whose children attended private schools. Ten years after that opinion was issued, the Court in *Mueller v. Allen*[222] considered a Minnesota statute permitting individuals to take a tax deduction for the "actual expenses incurred for the 'tuition, textbooks and transportation' of dependents attending elementary or secondary schools."[223] The *Mueller* Court noted that the Court had upheld reimbursement systems in the past for bus transporta-

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[220] *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (upholding New York reimbursement program for private schools where funds were provided to defray the costs of grading exams which had been created by the state.). The *Regan* Court cited *Wolman* for support. *See id.* at 654 ("We agree with the District Court that *Wolman v. Walter* controls this case.").

[221] *See supra* notes 148-57 and accompanying text.

[222] 463 U.S. 388 (1983).

[223] *Id.* at 391 (quoting MINN. STAT. § 290.09 (1982)).

tion,[224] and that states could loan secular textbooks to parochial schoolchildren without running afoul of constitutional guarantees.[225] The Court further noted that the Minnesota program promoted legitimate secular purposes of the state such as helping to produce an educated citizenry[226] and preventing an already heavily burdened public school system from being forced to shoulder an even greater burden.[227]

The *Mueller* Court suggested that the universality of the deduction[228] militated in favor of its constitutionality. That was accurate, at least in the sense that Minnesota's having limited the deduction to families with children attending private school would have militated in favor of the program's unconstitutionality. As the *Nyquist* Court had noted, a flaw of the New York program was that it only offered the grant at issue to parents of children in private schools.[229] Indeed, the *Mueller* Court emphasized that the case before it was "vitally different from the scheme struck down in *Nyquist* . . . . [where] public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools."[230] However, while the Minnesota and New York programs were distinguishable in that respect, there were at least two important ways in which the *Mueller* Court misrepresented *Nyquist*.

First, while it is true that the *Nyquist* Court had worried that a program that primarily benefited parents of children at-

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[224] *Id.* at 393 (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947)).

[225] *Id.* (citing Bd. of Educ. v. Allen, 392 U.S. 236 (1968)).

[226] *Id.* at 395.

[227] *Id.* The Court stated:

> Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers.

Id.

[228] *Id.* at 397 ("[T]he deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools.").

[229] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973).

[230] *Mueller*, 463 U.S. at 398.

tending sectarian schools would be politically divisive,[231] the *Mueller* Court failed to note that such a program might *primarily* benefit a group in one of two ways: (1) most of the individuals receiving the benefit belong to one particular group, or (2) while individuals belonging to many different groups receive some benefit from the program, most of the individuals receiving a substantial benefit from the program belonged to one particular group. As Justice Marshall noted in his *Mueller* dissent, the benefits afforded by the Minnesota program to parents of children attending public and private schools were not comparable. Children attending public schools would have no tuition to pay.[232] Although parents of children in the public schools could deduct the cost of "gym clothes, pencils, and notebooks,"[233] the amount that those items would cost pales in comparison to the cost of tuition.[234] A program affording thousands of dollars to individuals in one group and tens of dollars to individuals in other groups might be quite divisive, although it would be false to claim that only members of the first group received any benefit from the program.

Second, the *Mueller* Court was somewhat misleading when suggesting that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject,"[235] as if most, if not all, constitutional difficulties could be avoided by doing such channeling. Although the *Mueller* Court was correct to imply that there can be *additional* difficulties posed by direct funding because of the possible need for continuing audits to assure that the monies are not misspent, no Court had previously held or even implied that funneling the monies through individuals would immunize the use of

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[231] *See Nyquist*, 413 U.S. at 794.

[232] *Mueller*, 463 U.S. at 408 (Marshall, J., dissenting) ("Minnesota taxpayers who send their children to local public schools may not deduct tuition expenses because they incur none.").

[233] *Id.*

[234] *See id.* ("That the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition.").

[235] *Id.* at 399 (majority opinion).

those monies from further scrutiny. Indeed, the *Wolman* Court expressly repudiated Ohio's (alleged) attempt to avoid its constitutional obligations by channeling aid though parents and students.[236]

While recognizing that the "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children,"[237] the *Mueller* Court reasoned that public funds became available to the private schools "only as a result of numerous private choices of individual parents of school-age children,"[238] as if the fact that parents had made intervening choices would somehow permit the state to promote sectarian education. If that were correct, the *Everson* Court would hardly have based its decision on the aid being "so separate and so indisputably marked off from the religious function."[239] As Justice Marshall pointed out in dissent, *Nyquist* had "established that a State may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students."[240] While claiming to follow the opinion, the *Mueller* Court ignored *Nyquist*'s reasoning.

Someone reading *Mueller*'s interpretation of *Nyquist* would think that: (1) the *Nyquist* Court had struck down the program at issue because the benefit was reserved for parents of children attending private schools, and (2) the *Nyquist* Court would have upheld the program, notwithstanding its indirectly promoting sectarian education, if only the New York program had also benefited parents of children attending public schools. But that reading turns *Nyquist* on its head.

The *Nyquist* Court had struck down the program benefiting parents because it was not "sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectar-

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[236] *See supra* notes 209-10 and accompanying text.

[237] *Mueller*, 463 U.S. at 399.

[238] *Id.*

[239] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

[240] *See Mueller*, 463 U.S. at 404 (Marshall, J., dissenting) (citing Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 785-86 (1973)).

ian activities of religious schools."[241] The Court had noted in dictum that the "tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools," [242] but nonetheless refused to intimate "whether this factor alone might have controlling significance in another context in some future case."[243] Thus, the *Nyquist* Court struck down the program at issue because it did not include adequate restrictions to prevent its advancing sectarian objectives, but the Court also implied that a program with adequate restrictions still might not pass muster if the benefits of the program were reserved for members of a particular group. Without overruling *Nyquist*, the *Mueller* Court held that the program before it was permissible because parents of children in both public and private schools received some benefit, even though the Minnesota program lacked restrictions to assure that the sectarian activities of religious schools would not be advanced. Indeed, the Court in both *Nyquist* and *Everson* had emphasized the importance of the State not advancing sectarian instruction even indirectly, but that essential element was somehow considered irrelevant in *Mueller*.

B. The Prohibition on Advancing Sectarian Objectives

Mueller had the potential to effect an important change in sectarian aid jurisprudence. However, two subsequent decisions concerning aid to sectarian primary and secondary schools seemed to ignore *Mueller* and follow the example set in *Meek* and *Wolman*.[244]

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[241] *Nyquist*, 413 U.S. at 794.

[242] *Id.*

[243] *Id.*

[244] Three years after *Mueller*, the Court in *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986), considered whether the State violated Establishment Clause guarantees by providing services so that a visually handicapped student could receive training at a Christian college to become a pastor, missionary, or youth director. *See id.* at 483. The Court held that the Establishment Clause did not preclude this aid. *See id.* at 489. However, the Court had long emphasized that aid to sectarian colleges was constitutionally distinguishable from aid to sectarian primary and secondary schools. *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 765 (1976); Tilton v. Richardson, 403 U.S. 672, 685-89 (1971). Further, the Court had explained in *Witters* that sectarian aid might

Consider *School District v. Ball*,[245] where the Court considered two enrichment and remedial "programs in which classes for nonpublic school students [were] financed by the public school system, taught by teachers hired by the public school system, and conducted in 'leased' classrooms in the nonpublic schools."[246] Because almost all of the schools in the case were "pervasively sectarian,"[247] the Court worried that the program at issue might advance religion in three different ways:

(1) "[T]eachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs."[248]

(2) "[T]he programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school."[249]

(3) "[T]he programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected."[250]

The Court noted that some of the instructors in the after-school program who taught in the religious schools during the day would be "expected during the regular schoolday to inculcate their students with the tenets and beliefs of their particular re-

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be prohibited "even though it takes the form of aid to students or parents." *Witters*, 451 U.S. at 487 (citing Sch. Dist. v. Ball, 473 U.S. 373, 394 (1985)). Finally, the *Witters* Court had noted that grants at issue usually involved secular rather than sectarian training. *see id.* at 488 ("No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State's program."), implying that the use of grants for sectarian purposes might be upheld as a *de minimis* exception. *Cf. infra* note 374 and accompanying text discussing Justice O'Connor's belief that the actual diversion of public funds for sectarian purposes at issue in *Mitchell v. Helms*, 530 U.S. 793 (2000), was *de minimis*.

[245] 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[246] *Id.* at 375.

[247] *Id.* at 385.

[248] *Id.*

[249] *Id.*

[250] *Id.*

ligious faiths,"[251] but would be expected to "put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the schoolday is over." [252] The Court was not confident that the teachers would be able to reverse gears completely by offering sectarian education during the regular school session but purely secular instruction in the after-school program. After all, as the *Lemon* Court had pointed out years before, it may not always be so easy to determine which teaching is sectarian and which is secular.[253] Justice O'Connor noted in her concurrence and dissent that the program at issue would advance the religious aims of the pervasively sectarian schools, especially because "the teachers are accustomed to bring religion to play in everything they teach."[254] Because of the great likelihood that the state funds would be used to promote religion, the Court struck down the program as a violation of Establishment Clause guarantees.[255]

By the same token, the Court reached a similar result in *Aguilar v. Felton*,[256] in which the Court considered the constitutionality of instructional services provided to parochial students on parochial school premises.[257] The programs included remedial reading and mathematics, as well as English as a second language and some counseling services.[258] These programs were carried out by public school employees who volunteered to work in the private schools.[259] The volunteers were directed to avoid religious activities and not to have religious materials in the classroom.[260] The classrooms were to be cleared of all religious symbols. [261]

Appellants sought to distinguish this program from the one

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[251] *Id.* at 386.

[252] *Id.*

[253] *See supra* note 136 and accompanying text.

[254] *Ball*, 473 U.S. at 400 (O'Connor, J., concurring in part & dissenting in part).

[255] *See id.* at 397.

[256] 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[257] *Id.* at 406.

[258] *Id.*

[259] *Id.*

[260] *Id.* at 407.

[261] *Id.*

at issue in *Ball* by the oversight system that had been devised to assure that there would be no religious content in these classes.[262] The Court suggested, however, that this monitoring system itself violated the Establishment Clause's prohibition against excessive entanglement.[263] Justice Powell in his concurrence noted that the "government surveillance required to ensure that public funds are used for secular purposes inevitably present[s] a serious risk of excessive entanglement."[264] That risk was present "whether the subsidized teachers are religious school teachers, as in *Lemon,* or public school teachers teaching secular subjects to parochial school children at the parochial schools."[265] Whenever "there is too great a risk of government entanglement,"[266] the program will run afoul of Establishment Clause guarantees.

One might have inferred from *Ball* and *Aguilar* that the Court was limiting the force of *Mueller* to cases involving tax deduction programs. However, such an inference would have been inaccurate, as was made clear in the 1990s.

C. The Laundering Effect of Parental Choices

In part because of some of the seeds planted in previous cases and in part because of some unusual readings of previous cases, Establishment Clause jurisprudence regarding aid to primary and secondary sectarian institutions had changed radically by the year 2000. While members of the Court disagreed about which case represented a major break with the past jurisprudence, it was nonetheless clear that an important change had taken place.

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[262] *Id.* at 409 ("Appellants attempt to distinguish this case on the ground that the City of New York, unlike the Grand Rapids Public School District, has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools.").

[263] *Id.* ("But appellants' argument fails in any event, because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine.").

[264] *Id.* at 415 (Powell, J., concurring).

[265] *Id.* at 416.

[266] *Id.* at 415.

The Court's new understanding of the limits on state support of sectarian education in the primary and secondary setting was suggested in *Zobrest v. Catalina Foothills School District*[267] in which the Court examined whether it was permissible for the State to provide a sign-language interpreter for a deaf student attending a parochial high school.[268] The *Zobrest* Court foreshadowed that the limitations imposed by the Constitution on sectarian aid would thereafter be less robust when it offered a somewhat misleading summation of the past jurisprudence—the Court noted that it had "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit,"[269] and suggested that a contrary rule would require that churches not receive police or fire protection.[270]

Yet, the correctness of the claim that general benefit programs to *sectarian* primary and secondary schools had been upheld against Establishment Clause challenges depended in large part on the *type* of benefits at issue. For example, *Everson* established that bus transportation can be provided, even if doing so would provide an attenuated benefit to sectarian institutions, and a series of cases including *Allen*, *Meek*, and *Wolman* established that textbooks can be loaned to students even if doing so would provide an attenuated sectarian benefit. Yet, in all of these cases the state was funding something *secular*. The important point was not merely that the aid itself, for example, money, was secular, but that the services or products purchased by the money were secular.[271]

Consider what the Court deciding *Allen*, *Meek*, and *Wolman* would have said if a legislature had decided that it would pro-

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[267] 509 U.S. 1 (1993).

[268] *Id.* at 3.

[269] *Id.* at 8.

[270] *Id.*

[271] *Cf. infra* note 358 and accompanying text discussing *Mitchell* plurality's focus on whether the aid itself is secular rather than on whether, for example, it was being used to purchase something secular.

vide the money to purchase textbooks for both public and private school students as long as the former were approved by the responsible public authorities and the latter were approved by the responsible sectarian authorities. Were there no reference to religion and were there no requirement that the texts be secular, the Court would have struck down the program as a violation of the Establishment Clause. The "neutral" provision of textbooks could not have withstood scrutiny unless the state had explicitly referred to religion by requiring that the purchased books be secular—it was precisely because of the *Allen* Court's confidence that only secular textbooks would be approved that the Court upheld the textbook loan program in the first place.

The *Zobrest* Court implied that any potential Establishment Clause difficulties resulting from a state facilitating religious school education were cured if they occurred "as a result of the private decision of individual parents."[272] After all, because there was "no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking."[273] But up until this point, the constitutionality of state support of sectarian primary and secondary education had never been based on whether the presence in the school of that which had been funded could be attributed to state decisionmaking.[274]

Suppose, for example, that the choice of a sectarian textbook could in no way be attributed to the state because that textbook had already been chosen and would be used in certain

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[272] *Zobrest*, 509 U.S. at 10.

[273] *Id.*

[274] The *Zobrest* Court cited to *Witters* for support, *see id.* (citing Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986)), but the Court had long distinguished between Establishment Clause requirements for primary and secondary sectarian schools on the one hand and sectarian colleges and universities on the other. *See* Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 796 (2001) ("One distinction that did matter greatly, however, was that between elementary and secondary schools, on the one hand, and higher education on the other."). Further, the *Witters* Court had merely been pointing out that at issue before it was not "one of 'the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court.'" *See Witters*, 474 U.S. at 488 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 785 (1973)).

grades whether or not the state offered to reimburse the purchase price of that text. Prior to *Zobrest*, a state having no role in the choice of a religious textbook would not have been thought a reason that a state could help purchase such books without offending Establishment Clause guarantees.

The *Zobrest* Court suggested that disabled children rather than the parochial schools were the direct beneficiaries of the federal funds.[275] But the same rationale would permit a state to buy *sectarian* texts for students, since it would be the students rather than the schools who would be the direct beneficiaries of the state's largesse. So, too, that rationale would permit a state to fund sectarian auxiliary services like counseling, since the students in need rather than the schools would be the direct beneficiaries of that aid. Yet, both *Meek* and *Wolman* stood for the proposition that a state could not fund sectarian counseling services,[276] and *Allen*, *Meek*, and *Wolman* all emphasized the secular nature of the textbooks that were being provided by the state when upholding that aid.[277]

Finally, the *Zobrest* Court suggested that the interpreter should not be viewed as the analog of a teacher[278] but, instead, more like a machine that would translate oral language into sign language.[279] Because the parents chose to place their child in a "pervasively sectarian environment,"[280] and because the sign-language interpreter would "neither add to nor subtract from that environment,"[281] the Court held that the Establishment Clause did not bar the provision of that assistance.[282]

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[275] *Zobrest*, 509 U.S. at 12 ("Disabled children, not sectarian schools, are the primary beneficiaries . . . .").

[276] *See supra* notes 193-94, 204-06 and accompanying text.

[277] *See supra* notes 84-91, 166-67, 197 and accompanying text.

[278] *Zobrest*, 509 U.S. at 13 ("[T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor.").

[279] *Id.* ("Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to 'transmit everything that is said in exactly the same way it was intended.'").

[280] *Id.*

[281] *Id.*

[282] *Id.*

Certainly, there was precedent for the suggestion that services could be funded by states where there was no danger that the individuals providing the relevant service would intentionally or inadvertently alter that service by including sectarian instruction. Thus, the provision of diagnostic services within sectarian institutions was upheld in *Wolman* precisely because the Court believed that these services would not be used to impart sectarian instruction. But in *Wolman* the Court was approving the provision of services where there was no risk of adulteration because of the secular nature of the unadulterated service. The point was not simply that the funded service would not add to or subtract from the environment; on the contrary, the point was that whatever was added to the environment via the expenditure of state funds would be *secular*. As Justice Blackmun suggested in his dissent, the Court had never before suggested that the Establishment Clause permits a state to participate in religious indoctrination in a primary or secondary school setting.[283] He noted that the sign-language interpreter employed by the state would communicate the sectarian views in religion class or, perhaps, would provide assistance during religious services,[284] and concluded that while there are relatively few absolute prohibitions in the Court's Establishment Clause jurisprudence, "the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[285]

Of course, it is not as if the government was telling the school or the sign language interpreter what to say. Justice Blackmun's criticism might be viewed as missing the mark because the sign-language interpreter would do no "more than accurately interpret whatever material is presented to the class as

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[283] *Id.* at 18 (Blackmun, J., dissenting) ("Until now, the Court never has authorized a public employee to participate directly in religious indoctrination. Yet that is the consequence of today's decision.").

[284] *See id.* at 19 (noting that the "state-employed sign-language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Masses at which Salpointe encourages attendance for Catholic students").

[285] *Id.* at 21 (quoting Sch. Dist. v. Ball, 473 U.S. 373 (1985), *subsequently overruled by* Agostini v. Felton, 521 U.S. 203 (1997)).

a whole,"[286] and so might be thought analogous to a machine facilitating communication in some way. Suppose, for example, that James Zobrest had not been deaf but instead hard of hearing, and the state had merely provided a hearing aid. That would not offend constitutional guarantees, notwithstanding that the state was providing the means by which the individual might be indoctrinated into the beliefs of a particular faith. Indeed, the provision of a hearing aid would presumably be characterized as promoting health and safety,[287] and thus compatible with *Everson*.[288]

Yet, the hearing aid analogy is misleading because the hearing aid would presumably be used at all times and thus might more plausibly be argued to be related to health and safety, whereas the interpreter would only be used in class and thus would seem more closely associated with the instruction.[289] That difference is important. If the function of the sign language interpreter is to assist in instruction rather than promote safety and health, the constitutionality of the program would be in doubt—*Meek* had suggested that even secular materials and equipment could not be provided to facilitate education in sectarian schools.[290] Indeed, the respondent argued that just as *Meek* had made clear that the Constitution precluded a state from loaning equipment like a tape recorder to sectarian schools, the Constitution also precluded a state from supplying an inter-

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[286] *Id.* at 13 (majority opinion).

[287] *See id.* at 13 n.10. The Court explained:

> For instance, in *Wolman v. Walter*, we made clear that "the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion," even when those services are provided within sectarian schools. We accordingly rejected a First Amendment challenge to the State's providing diagnostic speech and hearing services on sectarian school premises.

Id. (citation omitted) (citing Wolman v. Walter, 433 U.S. 229 (1977), *subsequently overruled by* Mitchell v. Helms, 530 U.S. 793 (2000)).

[288] *See supra* notes 69-70 and accompanying text discussing the willingness of both the *Everson* majority and the *Everson* dissent to uphold expenditures promoting health, even if those funds benefited sectarian institutions.

[289] *See Zobrest*, 509 U.S. at 3 (discussing petitioner's request for a sign language interpreter to accompany him to his classes at a Roman Catholic high school).

[290] *See supra* note 177 and accompanying text discussing *Meek*.

preter to a sectarian school.[291] However, the Court rejected the analogy to *Meek* because *Meek* involved aid given directly to the school.[292]

The *Zobrest* Court's point that *Meek* was distinguishable because it precluded direct aid, although accurate, was not dispositive because *Wolman* had precluded even indirect aid. Yet, arguably, *Wolman*'s invalidation of the indirect aid was based on the Court's view that Ohio was trying to do an end run around *Meek*,[293] and there was no history of an end run around constitutional requirements in *Zobrest*. If the sign language interpreter was viewed as more analogous to a mechanical aid than to a teacher or counselor, [294] and the benefit was viewed as being given directly to the student, then the *Zobrest* decision might seem compatible with the existing jurisprudence.

Yet, there was at least one additional difficulty that the *Zobrest* Court did not adequately address. The interpreter was a person rather than a machine. An interpreter performing her duties would seem more likely to be viewed as an agent of the state engaging in religious instruction than would a machine amplifying sound.[295] Nonetheless, had the *Zobrest* Court somehow undermined the assertion that the provision of a sign language interpreter created a symbolic link between government and religion,[296] its contention that the decision was compatible with the existing jurisprudence would have been more plausible.

Regrettably, the *Zobrest* Court simply chose not to address this possible symbolic link, even after mentioning that the Court of Appeals had relied in part on this symbolic union of govern-

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[291] See *Zobrest*, 509 U.S. at 11.

[292] *See id.* at 12.

[293] *See supra* notes 210-11 and accompanying text.

[294] *Zobrest*, 509 U.S. at 13.

[295] Justice Blackmun suggested that it was significant for Establishment Clause purposes that the state was paying a human being to transmit religious doctrine. *See id.* at 23 (Blackmun, J., dissenting) ("Moreover, this distinction between the provision of funds and the provision of a human being is not merely one of form. It goes to the heart of the principles animating the Establishment Clause.").

[296] *See supra* note 248-50 and accompanying text discussing reasons that the *Ball* Court struck down the program at issue.

ment and religion to strike down the provision of this aid.[297] Perhaps the Court could have undermined this claim about symbolism by emphasizing that other state-paid professionals could work on-site in a sectarian institution without creating a symbolic link,[298] although Justice Blackmun argued to the contrary in his dissent.[299]

Rather than offer a careful analysis of the entire line of cases and explain how the provision of sign language interpreters fit within the existing jurisprudence, the *Zobrest* Court chose to rely heavily on two cases in particular that involved government programs aiding education,[300] *Mueller* and *Witters*.[301] While *Witters* might seem on point because it also involved aid to the handicapped,[302] the Court seemed to forget that the case is distinguishable because that aid went to a sectarian institution of higher education and not to a sectarian primary and secondary institution.[303] Further, both *Ball* and *Aguilar* had been decided after *Mueller*, so it was somewhat difficult for the *Zobrest* Court to suggest with any plausibility that *Mueller* had relaxed the limitations on a state promoting sectarian educa-

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[297] *See Zobrest*, 509 U.S. at 5.

[298] *See id.* at 13 n.10 (noting that public employees could provide health services on-site without violating constitutional guarantees and thus, presumably, not creating this forbidden linkage).

[299] *See id.* at 23 (Blackmun J., dissenting). Justice Blackmun wrote:

> But the graphic symbol of the concert of church and state that results when a public employee or instrumentality mouths a religious message is likely to "enlis[t]—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school." And the union of church and state in pursuit of a common enterprise is likely to place the *imprimatur* of governmental approval upon the favored religion, conveying a message of exclusion to all those who do not adhere to its tenets.

Id. (citing Sch. Dist. v. Ball, 473 U.S. 373 (1985), *subsequently overruled by* Agostini v. Felton, 521 U.S. 203 (1997)).

[300] *See id.* at 8-9 (majority opinion) (discussing "two cases dealing specifically with government programs offering general educational assistance").

[301] *See id.* at 8-10 (citing Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983)).

[302] *Witters* involved whether the State of Washington was precluded by the Establishment Clause from providing assistance to a visually handicapped individual attending a religious institution who was studying to be a pastor, missionary or youth director. *See Witters*, 474 U.S. at 483.

[303] *See supra* note 242.

tion.[304]

Without providing a plausible explanation of why it might be thought that *Mueller* had this effect, the *Zobrest* Court nonetheless suggested that its decision was compatible with the existing jurisprudence, implying that *Meek* and *Ball* were distinguishable.[305] Justice Blackmun disagreed, suggesting in his dissent that the Court was straying "from the course set by nearly five decades of Establishment Clause jurisprudence."[306]

Of course, even were Justice Blackmun correct that the Court was changing course, a separate question would involve how much or what kind of a change. For example, it might have been thought that *Zobrest* was merely permitting the state to fund neutral services analogous to the provision of hearing aids or glasses. Admittedly, the provision of such services would facilitate religious indoctrination, although perhaps no more so than the provision of free bus transportation.[307] Subsequent cases suggest, however, that some members of the Court viewed *Zobrest* as marking a sea change in the relevant jurisprudence.

D. Recognition of the Allegedly Implicit Overruling

The Court's sectarian aid jurisprudence from *Mueller* to *Zobrest* might be read in several ways. For example, *Mueller* might be read as modifying *Nyquist* but not as having significant implications for the kinds of issues raised in *Ball* and *Aguilar*. *Zobrest* might be read as either compatible with or as signaling an important break from *Ball*. In *Agostini v. Felton*,[308] the Court made clear that its understanding of the relevant jurisprudence had undergone a radical transformation.

In *Agostini*, the Court was asked to reconsider its holding in

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[304] As if the Court of Appeals had made an obvious mistake, the *Zobrest* Court wrote, "Viewed against the backdrop of *Mueller* and *Witters*, then, the Court of Appeals erred in its decision." *Zobrest*, 509 U.S. at 10.

[305] *See id.* at 12.

[306] *Id.* at 24 (Blackmun, J., dissenting).

[307] *See supra* notes 53-54 and accompanying text discussing Justice Rutledge's claim that the state was playing an important role in promoting sectarian education by providing free bus transportation.

[308] 521 U.S. 203 (1997).

Aguilar in light of the intervening jurisprudence.[309] The Court summed up its reasoning in *Ball* and *Aguilar* as follows:

> (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work;
>
> (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and
>
> (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.[310]

The Court noted in addition that *Aguilar* had assumed that "New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion."[311]

The Court explained that it had "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[312] Yet, the Court had already rejected the idea that the placement of public employees on parochial school grounds inevitably has impermissible effects even before *Ball* had been decided, having decided in *Wolman* that services that were not amenable to being used for sectarian indoctrination could be performed on-site.[313] Further, it was accurate but misleading for the *Agostini* Court to note that the *Zobrest* Court had "refused to presume that a publicly employed interpreter would be

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[309] *Id.* at 208-09 ("Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law.").

[310] *Id.* at 222.

[311] *Id.*

[312] *Id.* at 223.

[313] *See supra* notes 199-200 and accompanying text.

pressured by the pervasively sectarian surroundings to inculcate religion by 'add[ing] to [or] subtract[ing] from' the lectures translated."[314] Part of the reason that the publicly employed interpreter in *Zobrest* was unlikely to modify the message by inculcating religion was that she was working within a pervasively sectarian setting and thus would be translating material that already had a religious message.[315] Another part of the reason involved the very function performed by the interpreter—the Court had suggested that interpreters are qualitatively different from teachers and can be presumed to do no more than accurately translate the material.

The *Agostini* Court implied that just as it had assumed in *Zobrest* that an interpreter would act in good faith and translate accurately,[316] the Court should assume that the instructors and counselors in the program at issue in *Agostini*[317] also would act in good faith.[318] But this analysis rejected both the reasoning of *Zobrest* and what the Court had been suggesting since *Lemon*. *Zobrest* was predicated at least in part on the difference between interpreters and teachers—"the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor."[319] Further, the Court had never suggested that

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[314] Agostini v. Felton, 521 U.S. 203, 223 (1997) (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993)).

[315] *See Zobrest*, 509 U.S. at 18 n.2 ("The Faculty Employment Agreement provides: Religious programs are of primary importance in Catholic educational institutions. They are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other.") (internal quotation marks omitted).

[316] *Agostini*, 521 U.S. at 224 (citing *Zobrest*, 509 U.S. at 12) (noting the *Zobrest* Court's assumption that "the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said").

[317] *See id.* at 211.

[318] *Id.* at 226. The Court stated:

> [T]here is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in Zobrest to think an interpreter would inculcate religion by altering her translation of classroom lectures.

Id.

[319] *Zobrest*, 509 U.S. at 13.

teachers, for example, would act in bad faith and try to incorporate religious messages whenever they could. Rather, the fear had been that sectarian indoctrination might occur inadvertently. But if the fear is that this indoctrination would occur inadvertently, then even individuals attempting to teach the appropriate subject matter and act professionally might nonetheless perform (what at least some would call) religious instruction.[320] The *Agostini* Court was doing exactly what the *Meek* Court chided the district court below for having done, namely, "relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained."[321]

In what might most charitably be described as a cursory discussion in great need of further analysis and explanation, the *Agostini* Court reasoned, "Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place and we were able to conclude that 'the provision of such assistance [was] not barred by the Establishment Clause.'"[322] Yet, the question was why the Court believed that the interpreter herself was not inculcating any religious message. Certainly, she was the individual who was communicating the message and, further, there would have been no inculcation of any religious message if she had not performed her job. To the extent that she was viewed as a mere "mouthpiece"[323] and thus could not be understood to be inculcating any message, she would be distinguishable in kind from a teacher who could not be viewed as behaving so mechanically.[324] If there were some other way to

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[320] *See supra* note 136 and accompanying text discussing how individuals might differ with respect to what might constitute religious instruction.

[321] *See* Meek v. Pittenger, 421 U.S. 349, 369 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

[322] *Agostini*, 521 U.S. at 224 (citing *Zobrest*, 509 U.S. at 13).

[323] *Id.* at 226.

[324] The *Mitchell* plurality suggested that the interpreter conveys but does not inculcate, but did not explain why that was so. *See* Mitchell v. Helms, 530 U.S. 793, 823 (2000) (plurality opinion) ("[A] government interpreter does not herself inculcate a religious message—even when she is conveying one . . . .").

understand why the interpreter would not accurately be thought to be inculcating any religious message, the Court regrettably failed to provide that explanation.

Justice Souter in his *Agostini* dissent emphasized the difference between the functions performed by the interpreter and the teacher,[325] suggesting that the interpreter was more analogous to a hearing aid than a teacher.[326] On this understanding of sign-language interpretation, the service provided by the interpreter "could not be understood as an opportunity to inject religious content in what was supposed to be secular instruction,"[327] and *Zobrest* was compatible with *Meek* and *Ball*.[328] However, the Court suggested in response that if there were no opportunity to inject religious content, there would have been no reason for the Court to have consulted the record for reported instances of inaccurate translation.[329]

Yet the exchange between the majority and dissent in *Agostini* did little to clarify the relevant issues. Suppose, for example, that a hearing aid had been provided by the state. One might still want to make sure that the hearing aid was performing properly and see if there had been complaints about the aid's operation and performance. That one had checked to see if the aid was working properly would not establish that there had been an opportunity for inaccurate translation, although it would suggest that there had been a possibility of inaccurate translation.

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[325] *Agostini*, 521 U.S. at 248 (Souter, J., dissenting). Justice Souter said:

> In *Zobrest*, the Court did indeed recognize that the Establishment Clause lays down no absolute bar to placing public employees in a sectarian school, but the rejection of such a per se rule was hinged expressly on the nature of the employee's job, sign-language interpretation (or signing) and the circumscribed role of the signer.

Id. (citation omitted).

[326] *Id.*

[327] *Id.* at 248-49.

[328] *Id.* at 249 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993)) ("*Zobrest* accordingly holds only that in these limited circumstances where a public employee simply translates for one student the material presented to the class for the benefit of all students, the employee's presence in the sectarian school does not violate the Establishment Clause.").

[329] *Id.* at 225 (citing *Zobrest*, 509 U.S. at 13).

We would not describe the hearing aid as having had an opportunity to perform incorrectly because we do not think of hearing aids as *deciding* to act improperly. However, human beings might choose to inject religious content at inappropriate times and, in this sense, the Court was correct to suggest that interpreters, like teachers and counselors, might have similar opportunities to violate their duty.[330] Further, the *Agostini* Court was correct that there was no reason to assume that only sign language interpreters would be responsible or that only interpreters would not consciously try to undermine their official role by injecting religion into secular instruction.[331] Thus, the *Agostini* Court was correct to suggest that there was no reason to think that only interpreters would refrain from surreptitiously smuggling in sectarian content. The only difficulty with the Court having made these points is that they misrepresented the danger that had been discussed since *Lemon*, and thus involved arguments that were beside the point.

The *Agostini* Court was addressing a danger that had never been taken seriously with respect to either signers or teachers—namely, that they would consciously try to take advantage of opportunities to smuggle in religious content.[332] That this was not the worry is illustrated by *Wolman*, where the Court distinguished between the functions performed by diagnosticians and counselors, suggesting that the diagnostics could be performed on-site because there was relatively little chance that they would result in attempts at religious indoctrination,[333] whereas

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[330] *Id.* (suggesting that the "signer in *Zobrest* had the same opportunity to inculcate religion in the performance of her duties as do Title I employees").

[331] *Id.* ("[T]here is no genuine basis upon which to confine *Zobrest*'s underlying rationale—that public employees will not be presumed to inculcate religion—to sign-language interpreters.").

[332] *See* Wolman v. Walter, 433 U.S. 229, 247 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000) (citing Meek v. Pittenger, 421 U.S. 349, 371 (1975), *overruled by Mitchell*, 530 U.S. 793; Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971)) ("The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course.").

[333] *Id.* at 244.

> The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or

the counseling could only be performed off-site because of a greater chance of indoctrination.[334] If the concern had been that public personnel might seize any and all opportunities to promote sectarian objectives, then the Court would presumably have worried that those providing health services to children might use those opportunities to inculcate religious doctrine. But the *Wolman* Court made clear that it was not worried that those providing health services would use their time interacting with students to give religious instruction,[335] instead worrying about programs which were "susceptible to the intrusion of sectarian overtones."[336] Thus, the *Wolman* Court was not worried about individuals intentionally giving sectarian instruction when they should not but, instead, that such instruction might occur as a result of more subtle influences.

The focus of the *Ball* Court had been on *teachers* in particular, who might inadvertently inculcate religious beliefs or tenets.[337] Regrettably, the *Agostini* Court described *Ball* as having a much broader focus and as standing for the proposition that "*any* public employee who works on the premises of a religious school is presumed to inculcate religion in her work."[338] But the Court in cases prior to *Agostini*[339] had tried not to paint with

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> counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

Id.

[334] *Id.* at 247 ("We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views.").

[335] *See id.* at 243 n.11 ("[I]t is hard to believe that religious controversy would be generated by the offer of uniform health services for all schoolchildren.").

[336] *Id.*

[337] Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[338] *Agostini*, 521 U.S. at 222 (emphasis added).

[339] *See supra* notes 198-203 and accompanying text discussing *Wolman*'s distinguishing for constitutional purposes among different types of occupations.

such a broad brush, instead distinguishing among the types of public employees working within sectarian institutions and suggesting that certain occupations, such as teaching and counseling, involve a much greater risk of inadvertent promotion of sectarian objectives than do others. The *Agostini* Court simply ran roughshod over the Court's previous attempts to offer a more nuanced discussion[340] in what is admittedly a difficult area requiring great care.[341]

In what might be viewed as a surprising admission, the Court noted that "even the *Zobrest* dissenters acknowledged the shift *Zobrest* effected in our Establishment Clause law when they criticized the majority for 'stray[ing] . . . from the course set by nearly five decades of Establishment Clause jurisprudence.'"[342] Here, the Court implied that *everyone* on the Court understood that *Zobrest* was radically transforming the jurisprudence—the *Agostini* Court suggested that "it was *Zobrest*—and not this litigation—that created 'fresh law'. . . . Our refusal to limit *Zobrest* to its facts despite its rationale does not, in our view, amount to a 'misreading' of precedent."[343] Yet, this is simply breathtaking. The *Agostini* Court looked at what the *Zobrest* Court had suggested was compatible with the existing jurisprudence[344] and turned it into a watershed, allegedly understood to be so by all members of the Court at the time *Zobrest* was decided.

The *Agostini* Court modified the existing jurisprudence in yet another respect, undercutting the degree to which the State would have to entangle itself to assure that funds would not be

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[340] *Cf.* Sedler, *supra* note 5, at 189 ("In recent years, a Court majority has shown itself disposed toward rejecting . . . fine distinctions.").

[341] County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part & concurring in the judgment) ("We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding Establishment Clause cases.").

[342] *Agostini*, 521 U.S. at 225 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 24 (1993) (Blackmun, J., dissenting)).

[343] *Id. But see id.* at 249 (Souter, J., dissenting) ("The Court may disagree with *Ball*'s assertion that a publicly employed teacher working in a sectarian school is apt to reinforce the pervasive inculcation of religious beliefs, but its disagreement is fresh law.").

[344] *See supra* notes 300-05 and accompanying text.

used to promote sectarian indoctrination.[345] The Court noted that "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect,'"[346] and thereby made the three-part *Lemon* Test into a two-part test, at least for purposes of determining whether aid to sectarian schools violated the Establishment Clause.[347] The Court further noted that because it no longer presumed that state employees working in a sectarian environment would be at risk of inculcating religion,[348] believing instead that "properly instructed public employees [will not] fail to discharge their duties faithfully,"[349] a state would not be required to engage in pervasive monitoring of publicly funded teachers to assure that Establishment Clause guarantees were being observed.[350] Given these changes in the jurisprudence, the Court could no longer say that the program at issue violated Establishment Clause guarantees,[351] even though that very program had been held unconstitutional in *Aguilar*.[352]

By modifying when state funds might be presumed to be at risk of being used to promote sectarian objectives and modifying how the entanglement prong of *Lemon* would be analyzed, the *Agostini* Court created a much more forgiving Establishment Clause. That said, however, members of the *Agostini* Court did

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[345] *Cf. Mitchell*, 530 U.S. 793, 807 (2000) (citing *Agostini*, 521 U.S. at 233-34) (noting that the *Agostini* Court had recognized that the Court had "pared somewhat the factors that could justify a finding of excessive entanglement").

[346] *Agostini*, 521 U.S. at 232.

[347] *See Mitchell*, 530 U.S. at 807. The Court stated:

> Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors.

Id. (citation omitted).

[348] *Agostini*, 521 U.S. at 234 (stating the Court would "no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment").

[349] *Id.*

[350] *Id.*

[351] *Id.* at 240.

[352] *See id.* at 209 ("*Aguilar* is no longer good law.").

not cast doubt on the impermissibility of the state promoting sectarian education. Regrettably, members of the Court did just that in *Mitchell v. Helms*.[353]

E. Further Assaults on the Jurisprudence

In *Mitchell*, the Court examined a federal program channeling monies to public and private elementary and secondary schools to help provide services, materials, and equipment[354] that were "secular, neutral, and nonideological."[355] The plurality interpreted *Agostini* to stand for the proposition that the Establishment Clause prohibits the state from extending aid to sectarian schools only if the religious indoctrination that occurs could reasonably be attributed to that state.[356] To distinguish between indoctrination that might reasonably be attributed to a state and indoctrination that could not, the plurality suggested that neutrality was the key consideration, claiming that the Court had consistently upheld aid that was offered to a broad range of people without regard to religion.[357] The *Mitchell* plurality reasoned that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." [358] This reasoning suggests that a state could offer to pay the costs of textbooks in public and private schools, *without regard to content*, since no one would conclude that the sectarian texts chosen by the authorities in the sectarian schools were selected at the behest of the government.

The *Mitchell* plurality's Establishment Clause interpretation is incredibly permissive, suggesting that as long as (1) the

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[353] 530 U.S. 793 (2000).

[354] *Id.* at 803. The materials and equipment at issue included "library books, computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings." *Id.*

[355] *Id.* at 802 (citing 20 U.S.C. §7372(a)(1) (2000)).

[356] *Id.* at 809.

[357] *Id.*

[358] *Id.*

government is providing something that itself is secular, such as money, rather than something that has sectarian content, such as a religious book,[359] and (2) eligibility for the state aid violates no constitutional guarantees,[360] use of that aid to promote sectarian objectives will not involve government indoctrination and thus will not be of constitutional concern.[361] Lest the implications of this position be missed, the plurality made clear that the use of state aid to promote sectarian objectives could *not* be equated with religious indoctrination by the state.[362]

According to the *Mitchell* plurality, the relevant Establishment Clause question is not about whether state funds are being used to promote sectarian objectives,[363] but only about whether the aid itself has sectarian content.[364] Needless to say, this is a huge change from what even *Agostini* would allow.[365] Indeed, Justice O'Connor noted in her concurrence in the judgment that the plurality's "approval of actual diversion of government aid to religious indoctrination is in tension with . . . [the Court's] precedents,"[366] whereas Justice Souter put the matter more forcefully in his dissent—"The plurality position breaks fundamentally with Establishment Clause principle, and with the methodology painstakingly worked out in support of it."[367]

Even where state aid would qualify as neutral according to the *Mitchell* plurality and, for example, went directly to both

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[359] *Id.* at 820 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 245 (1968)) (stating the requirement that "governmental aid is not itself 'unsuitable for use in the public schools because of religious content'").

[360] *Id.* ("[E]ligibility for aid [must be] determined in a constitutionally permissible manner.").

[361] *Id.* (stating that, under these conditions, "any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern").

[362] *Id.* at 821 (rejecting that "the *use* of governmental aid to further religious indoctrination was synonymous with religious indoctrination *by* the government or that such use of aid created any improper incentives").

[363] *Id.*

[364] *Id.* at 822.

[365] Lupu, *supra* note 274, at 811 ("A plurality opinion, authored by Justice Thomas and joined by the Chief Justice, Justice Kennedy, and Justice Scalia, offered a bold and stunning repudiation of much of the prior law on the subject of aid to sectarian schools.").

[366] *Mitchell*, 530 U.S. at 837-38 (O'Connor, J., concurring).

[367] *Id.* at 869 (Souter, J., dissenting).

secular and sectarian institutions, Justice O'Connor suggested that the religious indoctrination resulting from the aid might nonetheless be attributed to the government. She wrote, "Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion."[368] She contrasted this with what an observer would think if the government monies were going to the institution as a result of the private choice of the individual, suggesting that no reasonable observer would infer that a state was endorsing a religious practice if the state aid went to a sectarian school as a result of independent decisions by private individuals.[369]

Several points might be made about the exchange between the *Mitchell* plurality and concurrence. First, the *Mitchell* plurality suggested that no reasonable person would infer state endorsement of religion under the facts of the case, notwithstanding that two members of the Court inferred endorsement under those very facts.[370] Either at least two members of the Court are not reasonable or the proposed standard is simply unworkable. Add to this that the plurality's position "would break with the law"[371] and "would be the end of the principle of no aid to the schools' religious mission," [372] and it should be clear that the test proposed by the *Mitchell* plurality cannot be thought to capture the previous Establishment Clause jurisprudence with respect to state aid to sectarian primary and secondary schools.

Second, Justice O'Connor is no longer on the Court. It is simply unclear whether Justice Alito will agree with the plurality about what no reasonable person would think, views to the contrary expressed by members of that very Court notwithstanding.

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[368] *Id.* at 843 (O'Connor, J., concurring).

[369] *Id.* (citing Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part & concurring in the judgment)).

[370] *See id.* Justice Breyer signed onto the concurrence. *See id.* at 836.

[371] *See id.* at 911 (Souter, J., dissenting). The dissent suggested that the funding violated the basic Establishment Clause principle that "there may be no public aid to religion or support for the religious mission of any institution." *Id.* at 884.

[372] *See id.* at 911.

Third, the facts of *Mitchell* can be read in very different ways. Both the plurality and the dissent believed that there had been a significant diversion of funds to promote sectarian education,[373] while the concurrence believed the diversion de minimis.[374] In future cases, it is quite likely that at least some on the Court will cite *Mitchell* as upholding direct state aid to sectarian schools that a majority on the Court had recognized was being used to promote sectarian education, although it is of course unclear whether this account of *Mitchell* will be offered in a majority, concurring, or dissenting opinion.

F. When Is Sectarian Support Reasonably Attributed to the State?

The *Mitchell* plurality and concurrence disagreed about whether state funding given directly to sectarian schools that supported religious teaching could reasonably be described as state support of religion. The existence of this disagreement did not convince these Court members that the standard itself was not suitable in this context. Nor did it convince them that their own intuitions about what reasonable people might say needed some fine-tuning. Instead, the Court in *Zelman v. Simmons-Harris*[375] adopted the position articulated by the *Mitchell* plurality and concurrence,[376] namely, that state aid channeled through private individuals that was used to promote sectarian objectives could not reasonably be attributed to the state.[377]

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[373] *Id.* at 833 (plurality opinion) ("[W]e agree with the dissent that there is evidence of actual diversion and that, were the safeguards anything other than anemic, there would almost certainly be more such evidence."); *id.* at 903 (Souter, J., dissenting) ("The type of aid, the structure of the program, and the lack of effective safeguards clearly demonstrate the divertibility of the aid. While little is known about its use, owing to the anemic enforcement system in the parish, even the thin record before us reveals that actual diversion occurred.").

[374] *Id.* at 864 (O' Connor, J., concurring) ("The evidence proffered by respondents, and relied on by the plurality and Justice Souter, concerning actual diversion of Chapter 2 aid in Jefferson Parish is *de minimis*.").

[375] 536 U.S. 639 (2002).

[376] *See supra* notes 357, 368 and accompanying text discussing the conditions under which support could not reasonably be attributed to the state.

[377] *See Zelman*, 536 U.S. at 652.

Regrettably, the Court again used the reasonable person standard[378] to uphold a program that at least one (unreasonable?) member of the Court understood to involve government support of religion.[379] In *Zelman*, the Court considered an Establishment Clause challenge to the Ohio voucher program that offered financial assistance to parents of children in the Cleveland public schools.[380] Most of the children participating in the program went to religiously affiliated schools.[381] The Court upheld the program, distinguishing between, on the one hand, direct aid to religious schools and, on the other, programs of "true private choice," where the government funds reach private schools as a result of independent choices by individuals.[382]

One of the issues dividing the Court was whether in fact the Ohio program provided true private choices. Justice O'Connor was confident that a true choice was offered,[383] because the nonreligious schools were "adequate,"[384] whereas Justice Souter suggested that the fact that "almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools"[385] indicated that there was a lack of true choice.

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[378] *Id.* at 655 ("[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.").

[379] *See id.* at 685 (Stevens, J., dissenting) (suggesting that what was at issue was "the government's choice to pay for religious indoctrination").

[380] *Id.* at 648 (majority opinion). The Court explained the program as follows:

> Ohio enacted, among other initiatives, its Pilot Project Scholarship Program (program). The program provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and operational management of the district by the state superintendent." Cleveland is the only Ohio school district to fall within that category.

Id. at 644-45 (citations omitted).

[381] *Id.* at 647 ("More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools.").

[382] *Id.* at 649, 653.

[383] *Id.* at 670 (O'Connor, J., concurring) ("There is little question in my mind that the Cleveland voucher program is neutral as between religious schools and nonreligious schools.").

[384] *Id.*

[385] *Id.* at 704 (Souter, J., dissenting).

Reasonable people might disagree about whether the Cleveland program gave parents enough choices so that it could not be struck down on that account. Given the jurisprudence since *Everson*, however, it is at the very least surprising that the constitutionality of the program would turn on whether the choices presented were adequate. As Justice Breyer pointed out in his dissent, at issue was the financing of "a core function of the church: the teaching of religious truths to young children."[386] Even Justice O'Connor noted that this case was unlike prior cases involving indirect financing of sectarian schools "because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds."[387] The *Zelman* Court had moved very far from the jurisprudence of *Everson*, *Allen*, and *Nyquist*, which had suggested that it was permissible for a state to give aid to parents whose children were attending private schools only if the aid would promote secular rather than sectarian objectives. Regardless of whether one accepts Justice Souter's assessment that *Zelman* represents all that has gone wrong in the development of Establishment Clause jurisprudence, since it is not only incompatible with *Everson*,[388] but betrays "every objective underlying the prohibition of religious establishment,"[389] there is some difficulty in understanding how *Zelman* can be thought to be part of the same jurisprudence that includes *Allen* and *Nyquist*.

IV. CONCLUSION

While *Everson* is sometimes characterized as being stridently separationist, that neither captures the majority opinion nor even the dissent. Rather, the *Everson* Court was trying to strike a balance so that the state would neither be favoring religion nor antagonistic towards it. The *Allen* Court likely modified the *Everson* standard from whether the aid at issue pro-

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[386] *Id.* at 726 (Breyer, J., dissenting).

[387] *Id.* at 663 (O'Connor, J., concurring).

[388] *Id.* at 688 (Souter, J., dissenting) ("How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot.").

[389] *Id.* at 711.

moted health and safety rather than education to whether the aid promoted secular rather than sectarian education. For the next few decades, the Court would uphold or strike programs based at least in part upon whether there seemed to be too great of a risk of promoting sectarian education. During this period, the Court articulated special concerns about the dangers posed by direct aid to sectarian schools.

In the 1980s, the Court reversed course. That, in itself, is unremarkable. What is more remarkable is that the Court consistently seemed to misrepresent past opinions, for example, suggesting in *Mueller* that channeling monies through individuals would immunize state funding rather than simply remove a source of additional constitutional concern. What is still more remarkable is that the *Agostini* Court implied that the *Zobrest* majority had knowingly created a sea-change in the jurisprudence while expressly claiming to be following it.

The pattern of misrepresentation continued when, for example, the Court claimed that its jurisprudence has long held that benefits conferred without reference to religion are not readily subject to Establishment Clause challenge when, until fairly recently, that was true only where the conferred benefits were *secular*. The requirement that the benefits be secular was not only that the aid itself be secular but also that state funds could only be used to purchase products or services that were themselves secular. Even *Zobrest* stands for this proposition if the sign language interpreter is likened to a (secular) hearing aid.

Mitchell and *Zelman* offer a radically different way to understand Establishment Clause guarantees. Reasonable people might disagree about whether that very forgiving version of the Establishment Clause better captures what the Clause should do. Yet, it is difficult to believe that members of the Court upholding the programs in those decisions took the past jurisprudence very seriously, even when claiming to do so.

Figuring out the appropriate test to determine whether Establishment Clause guarantees have been violated is a daunting task even for those who are either following the existing jurisprudence or, when necessary, overruling it. However, the task is

simply impossible when members of the Court consistently misrepresent what the Court has already done, whether intentionally or inadvertently. While the Court's having severely weakened the Establishment Clause's protections will be welcome to some, the Court's having done so in a way that undermines the Court's honesty, credibility, and integrity should be welcome to no one. The religious and the areligious alike are ill-served by the Court's recent analyses of the past jurisprudence, which obfuscates and misrepresents rather than clarifies and persuades, and one can only hope that the Court will reverse course and try to address what admittedly are vexing questions in a way that is honest and in the best of faith. The country deserves that and can afford no less.

WHY EVERY STATE SHOULD HAVE AN INCOME TAX (AND A RETAIL SALES TAX, TOO)

*Herwig Schlunk**

Abstract

Some states (like Florida and Texas) collect retail sales taxes but no income taxes; one state (Oregon) collects income taxes but no retail sales taxes; most states collect both. This paper examines the decision of a state to collect retail sales taxes, income taxes, or both in light of the state's spending policy and the ability of at least some of the state's residents to strategically migrate to another state (to take advantage of a more favorable mix of taxes and benefits). It concludes that states that rely solely (or even primarily) on either a retail sales tax or an income tax to finance their spending are generally pursuing an irrational and ultimately unstable course. Thus, states that seek to pursue an ultimately stable course must include in their revenue streams both a retail sales tax and an income tax.

* Professor of Law, Vanderbilt University Law School. The arguments in this paper are adapted from arguments I have made elsewhere in a completely different context. *See* Herwig Schlunk, *How I Learned to Stop Worrying and Love Double Taxation*, 79 Notre Dame L. Rev. 127 (2003).

I. INTRODUCTION

Two funny things happened almost immediately after I posted an early draft of this paper on the Social Science Research Network (SSRN). First, a local talk radio host asked if I would discuss it on air; then, a local tax reform group put me on its mailing list.[1] The former wanted to publicly thrash me for promoting increased taxation and all the perceived ills that accompany bigger government. The latter wanted to enlist my support for its promotion of increased taxation to fund a bigger and better government. These reactions to my title—and they must be reactions to my title, since my argument is not one for either increased taxation or bigger government—led me to realize the necessity of an immediate disclaimer: THIS PAPER DOES NOT ADVOCATE INCREASED TAXATION OR BIGGER GOVERNMENT. But, neither does this paper advocate decreased taxation or smaller government. It has no dog in the hunt of the level of taxation or the size of the government.

The questions of how much a state wants to spend—and thus, at least in the long run, how much it needs to tax—and how the state should ideally raise the amount it wants to spend, are logically distinct. This paper does not address the former; only the latter. A state like California or New York might choose to provide all manner of benefits to, and hence to undertake all manner of spending on behalf of, its residents; a state like Tennessee or Texas might choose to provide considerably fewer benefits, and hence to undertake less spending. But whatever the level of benefits (spending), the state must choose how to raise the revenue that will pay for the benefits (spending). For all but the luckiest states, the revenue

[1] The title of my earlier draft referenced my home state of Tennessee, a state without a broad-based income tax. Accordingly, it caught the attention of local residents. Some Tennesseans get extremely agitated at the mere mention of the possibility of an income tax, a mention that occurs with some regularity (i.e., whenever the state budget is in deficit). And other Tennesseans work tirelessly to get an income tax enacted. *See generally* John A. Walker III, *Why Tennessee Does Not Have an Income Tax*, 40 State Tax Notes 989 (June 26, 2006).

will come largely from taxes collected from residents. Those taxes, in turn, may be income taxes or consumption taxes (in practice, typically retail sales taxes) or a combination of both. This paper argues for a combination of both. Thus, New York and Texas *should* each rely on both income and consumption taxes; New York's taxes will simply need to be higher as necessitated by its desired level of spending.

My argument is not based on the benefits of diversifying a state's revenue sources, although such an argument may well have merit.[2] Rather, my argument is based on the ability of residents of one state to migrate to another state and the possibility that such migration will (at least at the margin) be strategic: an attempt to "arbitrage" the benefits and the costs of living in the various states. If such migration occurs, and if it occurs to a significant enough extent, it will undermine the finances of any state that chooses to rely either solely (or disproportionately) on an income tax or solely (or disproportionately) on a retail sales tax, instead of on a measured combination of both.

Part II of the paper offers a simple model of a state's finances. The model assumes that states spend money in order to provide benefits to their residents, sometimes in their residents' capacities as income producers and sometimes in their residents' capacities as consumers. It also assumes that states gather the money that they spend by taxing their residents, sometimes in their residents' capacities as income producers (an income tax) and sometimes in their residents' capacities as consumers (generally a retail sales tax). The model is employed to derive some insights into the connection between spending and taxes. In particular, if a state is in competition for residents with other states, a state's finances will generally be stable if and only if the state treats its residents "fairly." That is, a state

[2] The basic idea would be that an income tax is a more reliable revenue raiser in good economic times, since incomes generally go up more quickly than consumption (with savings accounting for the disparity). Conversely, a consumption tax is a more reliable revenue raiser in bad economic times, since consumption generally falls more slowly than incomes (with consumption financed by savings accounting for the disparity).

must spend amounts collected in taxes from its resident income producers on goods and services that benefit such income producers, and it must spend amounts collected in taxes from its resident consumers on goods and services that benefit such consumers. Any failure to follow the foregoing strategy will, over time, lead income producers and/or consumers to migrate to other states that offer them "fairer" treatment. If a sufficient number of income producers and/or consumers migrate into or out of the state, the state will find itself unable to maintain its original tax and spend policy.

Part III of the paper considers some complicating factors. For example, not all state spending is financed by state taxes; some is financed by outside sources such as federal government grants. Does this alter the conclusion reached in Part II? And some residents may prefer some types of state taxes to others due to the I.R.C. § 164 deduction for certain types of state taxes. Does this alter the conclusion reached in Part II? These and a number of other questions are probed in some detail, but in each case they do not, in fact, alter the conclusion reached in Part II of the paper. Thus, it really is the case that fiscal stability requires a state to spend amounts collected in taxes from its resident income producers on goods and services that benefit such income producers, and to spend amounts collected in taxes from its resident consumers on goods and services that benefit such consumers.

Part IV briefly discusses the findings of the three empirical studies that have addressed some of the issues raised in this paper. Although each such study is quite narrow—they all focus solely on the migration of retirees, who are not necessarily a representative sample of any state's residents (they generally are more mobile and do not earn active business income)—each one produced results that are consistent with my model's predictions. Finally, Part V is a brief conclusion.

II.: A Model of a State's Budget

I begin with a simplified model of the finances of the fifty states. I assume each state makes a governmental spending decision subject to a budget constraint; a state cannot spend any

funds it is unable to acquire. I also assume each state is benevolent: aside from repaying any borrowings (with interest), it spends solely with the intention of benefiting persons with a sufficient nexus to the state, e.g., businesses that conduct business in the state (henceforth, "local businesses") and individuals who are resident in the state. Further, aside from incurring borrowings, each state is able to acquire funds solely by imposing taxes directly on such same persons. From these assumptions it follows that the net present value of each state's expenditures on benefits must equal the net present value of that state's tax collections. Moreover, if each state generally eschews all but very short-term borrowings, it follows that each state's annual expenditures on benefits must on balance equal such state's annual tax collections.

A. Expenditures

How does, or rather how should, a given state think about its expenditures? The state has a wide menu of goods and services that it can choose to purchase and provide: police protection, roads, schools, a legal system, a safety net of health and welfare benefits, and so on. In order to be provided, such goods and services should ideally pass the following test: they should obviate the need for more costly self-help on the part of the persons who (are intended to and/or do) benefit from the provision of such goods and services.

For example, a state might consider providing policemen and a criminal justice system for the purpose of protecting local businesses: police cruisers would make frequent passes of business establishments, deterring would-be thieves; police detectives would investigate business thefts and arrest perpetrators, further deterring would-be thieves; and courts would try the arrestees and prisons would house them, still further deterring would-be thieves. In the absence of these policemen and this criminal justice system, owners of businesses would resort to incremental self-help to achieve their desired optimal amount of deterrence: they might install steel-reinforced doors or more sophisticated monitoring cameras or hire additional security guards or whatnot. If the aggregate cost of

such incremental self-help measures that would be adopted by all local businesses exceeds the cost of the state-provided benefits, the state should provide the benefits.

What is the effect on local businesses of the state's decision whether or not to provide these benefits? Note that the benefits at issue do not affect the nature of the good or service that any business produces: the ultimate consumer neither knows nor cares whether or how the business protected its assets en route to producing its particular good or service. Thus, so long as a business is operating in a competitive environment, i.e., is a price-taker, the presence or absence of the state-provided benefits does not affect the amount that the business can charge the ultimate consumer of its good or service. It follows that if the state does not provide the benefits, and a business instead incurs incremental expenses to protect itself, such business, or more correctly the individuals who share in the fruits generated by such business, will earn diminished profits. Alternatively, if the state does provide the benefits, and a business therefore does not incur incremental expenses to protect itself, such business, or more correctly the individuals who share in the fruits generated by such business, will earn augmented profits. Since the individuals who share in the fruits generated by the business generally include both the legal owners of the business and the employees of the business,[3] I can summarize the foregoing analysis as follows: a state's provision of policemen and a criminal justice system will, all else being equal, increase the income of the owners of any local business or that business's employees or both.

Of course, a state might also consider providing policemen and a criminal justice system for the purpose of protecting personal residences: police cruisers would make frequent passes through residential neighborhoods, deterring would-be thieves:

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[3] The owners of a business confronted with diminished margins can either settle for pocketing a smaller profit attempt to reduce the price they pay to suppliers, including especially their employees; or most likely do a little bit of both these things. Conversely, the owners of a business greeted by augmented margins can either pocket a larger profit, share the wealth with their suppliers, including especially their employees, or most likely do a little bit of both these things.

police detectives would investigate break-ins and arrest perpetrators, further deterring would-be thieves; and courts would try the arrestees and prisons would house them, still further deterring would-be thieves. In the absence of the policemen and the criminal justice system, homeowners would resort to incremental self-help: they might place bars over their windows or install elaborate security systems or buy guns or whatnot. Once again, if the aggregate cost of such incremental self-help measures that would be adopted by all homeowners exceeds the cost of the state-provided benefits, the state should provide the benefits.[4]

What is the effect on homeowners of the state's decision whether or not to provide these benefits? Note that the benefits at issue do not affect the nature of the good or service that any homeowner consumes: by definition, the housing services provided either by the combination of the house and the state's police protection or by the combination of the house and the homeowner's incremental self-help measures are identical. Thus, if the state does not provide the benefits and a homeowner instead incurs incremental expenses to protect his home, such homeowner will have less cash available to spend on other consumption.[5] On the other hand, if the state provides the benefits and a homeowner therefore does not incur incremental expenses to protect his home, such homeowner will have more cash available to spend on other consumption. I can summarize

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[4] One of the greatest benefits of providing certain services through the state is that it prevents private wasteful competition. For example, if the state provides security services that it administers without favoritism, all of its residents will be equally protected. On the other hand, if individuals invested in their own protection, any one resident's investment affirmatively harms his neighbors – by making such neighbors relatively more vulnerable – thus imposing a cost on them. This encourages (indeed more or less forces) the neighbors to invest as well, thereby leading to an arms race that may culminate in aggregate expenditures that greatly exceed their marginal benefit. (Each individual will want to set his marginal cost equal to his marginal benefit. From a societal viewpoint, however, his marginal cost should be set equal to his marginal benefit reduced by the marginal harm he inflicts on his neighbors.)

[5] Depending on the way in which the state financed the provision of the benefits, some or all of the cost savings would be capitalized into the price of the home. To the extent of such capitalization, a subsequent purchaser of the home would not enjoy a similar windfall.

the foregoing analysis as follows: a state's provision of policemen and a criminal justice system will, all else being equal, increase the level of potential consumption expenditures by homeowners.

There is nothing particularly unique about police protection and criminal justice infrastructure. Thus, a similar analysis could be applied to literally all of the goods and services provided by state government: such goods and services increase the income that can be earned by local businesses and their employees and/or stretch the consumption dollars of residents. For example, good roads enable manufacturers to more cheaply ship their products; this increases their profits and also ultimately their ability to pay wages to their employees. In addition, good roads enable employees to spend less money repairing the automobiles they use to commute to work; thus, the income they earn from their employment is greater.[6] Good schools enable employers to spend less money educating their work force; this increases their profits and ultimately their ability to pay wages to their employees. Similarly, good schools enable potential employees to develop skills that will enable them to perform more complicated tasks; these skills will increase their productivity and hence their wages. A functioning legal system enables entrepreneurs to protect their intellectual property and thereby allows them to create wealth both for themselves and their employees. A functioning legal system also allows employees to spend less time and money protecting themselves from all sorts of workplace hazards, thus increasing the income from their employment. Finally, the existence of a rudimentary safety net of health and welfare benefits allows employers to forego providing these benefits to their employees, thus increasing the employers' profits. Rudimentary health and welfare benefits also allows employees to ask for wages which are greater, when the state's benefits are taken into account,

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[6] The word income in this sentence refers to economic rather than taxable income. The economic income of a wage earner is the excess of the wages he earns over his costs of earning such wages; his direct and indirect commuting costs are one of the costs of earning such wages. The federal income tax, alas, does not tax wage earners on their economic income: certain costs of earning such income, including specifically direct and indirect commuting costs, are not generally deductible.

than they would have been in the absence of the state's benefits.[7]

Focusing now on consumers, good roads enable them to more cheaply visit their relatives; this increases the amount of money in their pockets for other consumption. Good schools enable consumers to spend less money educating their children; this too increases the amount of money in their pockets for other consumption. A functioning legal system enables consumers to avoid spending large amounts of money protecting themselves from unlikely but potentially harmful product defects; this too increases the amount of money in their pockets for other consumption. Finally, the existence of a rudimentary safety net of health and welfare benefits allows consumers to save less to protect themselves and their families from the effects of certain personal catastrophes; this yet again increases the amount of money in their pockets for other consumption.

B. Arithmetic

Solely for purposes of illustration, I will make the foregoing more concrete with a bit of arithmetic. Suppose, as above, that a producer of income would, in the absence of any state-government-provided package of goods and services, spend a certain amount of his income to provide himself with benefits that could, in theory, be provided by the state: protection of property, transportation services, and so forth. Suppose further that due primarily to economies of scale, the state can provide

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[7] Wal-Mart has become notorious for relying on states to provide health care to its lowest paid employees. Except for the bad publicity, and probably in spite of such publicity, this practice surely increases its profits. But relying on states to provide health care also increases the wages, net of the cost of health care, that Wal-Mart pays its employees. For example, suppose that the health safety net provided by a state is worth $1 an hour for a low-wage employee. Wal-Mart will be indifferent between paying such employee a wage a $7 per hour without health benefits and a wage of $6 per hour with $1 per hour of health benefits. However the employee will prefer the $7 per hour without health benefits since he can obtain the health benefits from the state "for free." Ultimately, Wal-Mart and the employee will in some manner split the benefit of the state's safety net: perhaps Wal-Mart will pay a wage of $6.10 per hour, thus pocketing an additional $0.90 per hour of profit at the expense of the state. But this means that the employee is still $0.10 per hour better off than he would have been had Wal-Mart provided the health benefits directly.

many of these benefits more cost effectively. For example, suppose that for every $100 of gross income earned by an income producer, if the state spends $1 on beneficial goods and services, it can save such income producer $5 of costs. Under these predicates, the state should spend at least $1 on such goods and services; even if the state charges the income producer $1 on average for such goods and services (e.g., through the tax system), the producer will net an additional $4 of disposable income.

Now suppose, given diminishing returns, that each additional $1 spent by the state on beneficial goods and services generates progressively smaller cost savings on the part of the income producer. For example, suppose that the second $1 spent by the state generates $4 of cost savings for the income producer, the third $1 spent generates $3 of cost savings, and so on. Given this benefits technology, the state should ideally spend $5 on goods and services for every $100 of gross income earned by an income producer.

Table 1: State Benefits Technology ($)

Marginal State Spending	Cumulative State Spending	Marginal Cost Savings	Cumulative Cost Savings
1	1	5	5
1	2	4	9
1	3	3	12
1	4	2	14
1	5	1	15
1	6	0	15
1	7	-1	14

Of course, there are lots of reasons why a state might spend more or less than the ideal amount. The most benign reason for misspending is that it is far from clear, no matter how much effort is put into the discovery process, exactly what the true relation is between state spending and cost savings. There are less benign reasons as well. For example, a state might spend more than the ideal amount if its legislative process is captured

by interest groups, so that the state government, in effect, behaves less like a benevolent sovereign and more like a puppet for special interests. On the other hand, a state might spend less than the ideal amount if its residents and their representatives have an irrational fear that additional spending—even additional cost-effective spending—will lead the state into the clutches of the "socialist" bogeyman.

Finally, note that an identical arithmetic analysis can be provided for the case of state-provided goods and services that facilitate consumption. That is, a consumer of income would, in the absence of a state-provided package of goods and services, spend a certain amount of his income on certain benefits that could, in theory, be provided by the state: protection of property, transportation services, and so forth. Again, due primarily to economies of scale, the state can provide many of these benefits more cost effectively. For example, suppose that for every $95 of gross consumption, if the state spends $1 on beneficial goods and services, it can save such consumer $5 of costs. Under these predicates, the state should spend at least $1 on such goods and services; even if the state charges the consumer $1 on average for such goods and services (e.g., through the tax system), the consumer will net an additional $4 of disposable income.

Below, I assume that the state's technology for delivering benefits that facilitate consumption is essentially identical to the technology illustrated in Table 1.[8] Thus, the first $1 spent by the state will save the consumer $5 of expenditures; the second $1 spent will save the consumer $4 of expenditures, and so on. Once again, the state will ideally spend exactly $5 on goods and services that facilitate consumption; once again, for a host of reasons, it might choose to spend either more or less.

C. Tax Collections

There is no such thing as a free lunch. The goods and services provided by a state are costly. Thus, once a decision has been reached to provide a given level of goods and services, a state must find sources of revenue to purchase these goods and

[8] *See supra* Table 1 p. 646.

services. While there are a host of possible sources that may defray part of a state's expenditures—lotteries, user fees, tobacco litigation settlement proceeds, grants from the federal government, etc.—my model's assumptions reduce the number to the most significant two: borrowing and taxes. Moreover, since borrowing along with its attendant interest expense must eventually be repaid, borrowing does not represent an independent source of revenue: a borrowing decision is merely one that pushes taxation into the future. Thus, a state's only real choice, once it has decided on a spending plan, is whether to collect its taxes today, tomorrow, or partly today and partly tomorrow. And, of course, the state must also decide whom or what to tax.

As a practical matter, the question of whom or what to tax largely devolves into a question of whether to tax broadly-defined income, broadly-defined consumption, or both. Once again, this is not to suggest that other alternatives may not occasionally be available. For example, some states, such as Alaska, are able to extract considerable revenue from narrowly-defined income taxes, often called severance taxes, while other states, such as Nevada, are able to extract considerable revenue from narrowly-defined consumption taxes, often called excise taxes. For most states, however, such alternatives will not be available. And for these states the question remains: income tax, consumption tax, or both.

In answering this question, it should be noted that there is nothing inherently "unfair" in a state enacting either an income tax or a consumption tax. As already demonstrated, the goods and services funded by a state's taxes allow local businesses and residents to earn or keep incremental amounts of income; taxing away some or all of such incremental income to pay for the goods and services that made the incremental income possible would be the very height of fairness, at least when compared to any other alternative. Similarly, the goods and services funded by a state's taxes allow residents to engage in incremental consumption; taxing away some or all of such incremental consumption to pay for the goods and services that made the incremental consumption possible would again be the very

height of fairness, at least when compared to any other alternative. Given this, it should not be surprising that most states, through the combination of an individual (and perhaps also a corporate) income tax and a retail sales tax, do indeed tax both income and consumption.

While it is clearly "fair" for a state to tax both income and consumption, is it in any sense "necessary" for it to do so? That is, can a state choose to tax either the producers of income (at the instant of production) or the consumers of income (at the instant of consumption), but not both, and yet leave all producers and consumers of income as well off as they would have been had it chosen to tax both producers and consumers? It is tempting to think that it can. After all, every producer of income is also a consumer of income; all income produced (i.e., earned) is eventually consumed.[9] Thus, a decision to solely tax income can be viewed as being in part a decision to tax the ultimate consumption of such income, albeit perhaps a long time before such consumption actually occurs. Similarly, a decision to solely tax consumption can be viewed as being in part a decision to tax the income that facilitated such consumption, albeit perhaps a long time after such income was actually earned.

Given this, it is hardly surprising that it is possible to construct parameters under which it is equivalent for a state to opt either for a tax solely on income or for a tax solely on consumption, rather than for a combination of the two. To illustrate, suppose that a state knows all of the following:

The goods and services the state intends to provide to facilitate the earning of $100 of income by a resident individual will cost the state $5 to provide.[10]

The goods and services the state intends to provide to facilitate the consumption of $90 of income by a resident

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[9] True, the consumption may occur a long time after the production (perhaps by an heir many generations distant), but why should that matter?

[10] I make no assumption, in this subsection, as to the value of the benefit the income producer receives from the state's expenditures, other than that such value at least equals the state's costs.

individual will cost the state $5 to provide.[11]

The relative cost of the goods and services the state intends to provide, in relation to the amount of income or consumption such goods and services facilitate, will not vary over time.

All income produced in the state is ultimately consumed in the state, perhaps by the resident individual who earned the income, perhaps by his heirs.

Under these predicates, the state might consider imposing a 5% income tax (i.e., a tax on the production of income) and a 5.55% retail sales tax (i.e., a tax on the consumption of income). Under such a tax structure, an individual would pay $5 of income tax as and when he earns $100 of income, which is precisely the amount of tax necessary to pay for the goods and services that the state provides for his benefit in his capacity as a producer of income. Then, if he immediately consumes $90 of his after-income-tax income, he would pay an additional $5 of retail sales tax, which is precisely the amount of tax necessary to pay for the goods and services that the state provides for his benefit in his capacity as a consumer of income. Alternatively, if he invests his $95 of after-income-tax income, perhaps for 23.5 years at an after-tax rate of 3%, so that his original $95 will double to $190, and if he then consumes $180 of this amount, his consumption will benefit from $10 of contemporaneous state expenditures, and at a 5.55% retail sales tax rate, this is precisely the amount of tax he will then be required to pay.

While this combination of state-levied taxes is certainly the most natural, an infinite number of other combinations are possible. I will consider only two of these. At one extreme, the state could impose a 10% income tax, with no additional retail sales tax. Under such tax scheme, the state would collect $10 at the time the individual earns $100 of income, but would only need $5 of that amount to cover the cost of the goods and services it provides with respect to his productive activity. Accordingly, it would have $5 either to spend immediately to facilitate the individual's $90 of consumption, should the

[11] I make no assumption, in this subsection, as to the value of the benefit the consumer receives from the state's expenditures, other than that such value at least equals the state's costs.

individual choose to immediately consume his after-tax income, or to invest if the individual instead chooses to invest and hence defer his consumption. Assuming that the state invests at the same rate of return as the individual,[12] and assuming as above that the individual invests for a total of 23.5 years prior to engaging in consumption, the state's $5 will increase to $10 at the same time that the individual's $90 increases to $180. Thus, when the individual spends his $180 on consumption, the state will spend its $10 on facilitating goods and services, and both the state and the individual will end up in exactly the same position they were in under a regime with a 5% income tax and a 5.55% sales tax.

At the other extreme, the state could impose no income tax at all, but simply collect an 11.1% retail sales tax. Under this alternative, and focusing solely on the case of deferred consumption, the state would need to borrow $5 at the time the individual earns his income since it would have no tax revenue to spend to provide the goods and services that are necessary to facilitate his production of the income. Without loss of generality, and to simplify matters, suppose the state borrows the $5 from the individual himself. Now, if the individual again waits 23.5 years prior to engaging in consumption, the individual's $5 invested with the state will grow to $10, and his $95 invested elsewhere will grow to $190. In all, he would have $200 to spend. Thus, he could spend $180 prior to the imposition of the 11.1% sales tax. The state would collect $20 of sales tax, use $10 to pay off its borrowing, and use the remainder to purchase the $10 of goods and services that facilitate the individual's consumption. Once again, both the state and the individual end up in exactly the same position they were in under a regime with a 5% income tax and a 5.55% sales tax.

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[12] The state should be able to invest at a higher rate, since it is not taxable. But perhaps for political reasons, states do not generally collect surpluses and invest them for long periods of time. Thus, a state that collects a surplus will almost surely use such surplus to retire its existing debt obligations. If so, it effectively earns the same rate of return on such surplus as it would have paid on its debt obligations. And this, in turn, is the same rate of return as the individual earns.

While the foregoing illustration demonstrates the theoretical possibility that a state could be in a position where it can opt either for a traditional combination of an income tax and a retail sales tax or for a fully equivalent income tax without a retail sales tax or for a fully equivalent retail sales tax without an income tax, it is unlikely that a state will ever find itself in this position. This is because the predicates that allow for the income-tax-only or the retail-sales-tax-only alternatives will generally not be satisfied.

D. Tax Collections When Expenditures Vary over Time

The cost of the goods and services a state provides, relative to the amount of income or consumption such goods and services facilitate, may vary over time. In particular, the tastes and expectations of residents as to what goods and services are or are not necessary or appropriate for a state to provide tend to change. Sometimes the political winds are such that a state is expected to provide lots of goods and services. Other times state-provided goods and services are expected to be pared to the bone.[13] Only the traditional combination of an income tax and a retail sales tax can effectively take these changes into account, and thus ensure that each resident individual is taxed appropriately given the goods and services that the state actually provides for his benefit. To illustrate, suppose that

At the time an individual earns $100 of income, the goods and services the state provides to facilitate such income cost the state $5. Moreover, at that same time, the goods and services the state provides to facilitate $90 of consumption cost the state $5.

At the time the individual spends his after-income-tax invested income, perhaps 23.5 years later, state finances have changed so that the state provides goods and services costing only $3 to facilitate the production of every $100 of income. Moreover, at that same time, the goods and services the state

[13] Neither of these circumstances will necessarily be based on whether the state's expenditures are cost effective, although they may be based on popular perceptions of such cost effectiveness.

provides to facilitate $94 of consumption also cost the state only $3.

For purposes of comparison, the three tax regimes that I will have the state consider are either (1) an income tax at a rate of 5% today and reduced to 3% in 23.5 years combined with a retail sales tax at a rate of 5.55% today and reduced to 3.2% in 23.5 years, (2) an income tax at a rate of 10% today and reduced to 6% in 23.5 years, with no accompanying retail sales tax, and (3) a retail sale tax of 11.1% today and reduced to 6.4% in 23.5 years, with no accompanying income tax. Thus, I assume that the state's tax regime always reflects the current costs of the goods and services it provides. I also assume that if the state relies either solely on an income tax or solely on a consumption tax, it will impose a tax rate implicitly based on the assumption that all income is immediately consumed. This may or may not be the most realistic assumption.[14] However, the state must make *some* assumption, and whatever assumption it makes produces the problem I describe below. Thus, for the sake of exposition, I make the stated assumptions.

How do the three alternative tax regimes compare? Under the first regime, with its combination of an income tax and a retail sales tax, the individual earns $100 today and immediately coughs up $5 of income tax. He invests his remaining $95 for 23.5 years, watching the amount double. He then spends $184 on consumption, coughing up $6 of sales tax.[15] The state, meanwhile, spends $5 today on goods and services to facilitate the individual's $100 of earnings and spends an additional $6 in 23.5 years to facilitate his $184 of consumption. Since the state's tax revenues at all times exactly match its spending, the state never has either a surplus or a deficit, and

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[14] It is probably an acceptable assumption when aggregated over all residents, given the very low aggregate savings rate in the United States. *See* http://www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=120&ViewSeries=NO&Java=no&Request3Place=N&3Place=N&FromView=YES&Freq=Year&FirstYear=1996&LastYear=2008&3Place=N&Update=Update&JavaBox=no#Mid (last visited Feb. 26, 2009).

[15] I have rounded these numbers, since using the actual numbers, $184.11 and $5.89, would diminish the aesthetics of the main text without in any way changing the argument. I will similarly round certain numbers in the paragraphs that follow.

moreover has no need to engage in any borrowing or lending activity.

Under the second regime, which features solely an income tax, the analysis becomes more interesting. The individual earns $100 today and immediately coughs up $10 of income tax. He invests his remaining $90 for 23.5 years, watching the amount double. He then spends all $180 on consumption, since the state imposes no sales tax. The state, meanwhile, spends $5 today on goods and services to facilitate the individual's $100 of earnings, and spends an additional $5.75 in 23.5 years to facilitate his $180 of consumption. To offset this spending, it collects $10 of income tax today. After paying $5 for today's provision of goods and services, it has $5 remaining which it presumably uses to pay off existing indebtedness, thus effectively investing such amount at a rate that will see the amount double over 23.5 years. Therefore, in 23.5 years, the state has $10 available to finance its spending on the goods and services that facilitate the individual's consumption. Since it spends only $5.75 on such goods and services, it pockets $4.25. Thus, the state has effectively overcharged the individual by this amount for the goods and services it has provided to him.

Finally, under the third regime, which features solely a retail sales tax, the individual earns $100 today and pays no state income tax. He invests his $100 for 23.5 years, watching the amount double. He then spends $188 on consumption, and coughs up his remaining $12 to pay his sales tax obligation. The state, meanwhile, spends $5 today on goods and services to facilitate the individual's $100 of earnings and spends an additional $6 in 23.5 years to facilitate his $188 of consumption. To offset this spending, it must borrow $5 today. The amount owed for this borrowing compounds over the ensuing 23.5 years: at the end of this time, the state owes $10. Since this $10 is combined with the state's future expenditure of $6, the state must now find aggregate revenue of $16. Alas, its only revenue source is the individual's retail sales tax payment of $12. Thus, the state has a shortfall of $4. The state has effectively undercharged the individual by this amount for the goods and services it has provided to him.

Obviously, only the first of these three alternatives is fully satisfactory. Under a properly designed combination of an income tax and a retail sales tax, a state runs a balanced budget with respect to each and every one of its residents. Thus, *importantly*, it does not transfer wealth from one resident (whether in his capacity as a producer of income or a consumer of income) to another resident (whether in his capacity as a producer of income or as a consumer of income).[16]

Neither of the other two tax regimes shares this feature. For example, in the income-tax-only tax regime, the state overcharges the resident (henceforth, Taxpayer #1) in my illustration.[17] This overcharging does not necessarily mean that the state runs an overall budget surplus. To see this, suppose that there is a second resident in the state, Taxpayer #2, who has a consumption and production pattern that is essentially the reverse of that of Taxpayer #1: Taxpayer #2 initially spends $90, funded by borrowing, and 23.5 years later earns $191.50, which he uses in part ($180) to pay off his borrowing and in part ($11.50) to pay his income taxes. Note that under these assumptions the state does not at any time have an unbalanced budget. However, it has transferred wealth ($2.12 in terms of net present value or $4.25 in terms of future value) from Taxpayer #1 to Taxpayer #2.

[16] Of course, nothing prevents the state from explicitly transferring wealth from one resident to another, for example, through a program establishing a social safety net. But, any such transfer would be explicit and therefore transparent, rather than simply a consequence of the design of the tax regime.

[17] Under the alternative assumption that the relative cost of state-provided goods and services rises over time, the state would have undercharged the resident in the illustration.

Wealth Transfer under an Income-Tax-Only Regime

	Taxpayer #1			Taxpayer #2		
	Income	Consumption	NPV	Income	Consumption	NPV
Time = 0	100				90	
Tax collections	10		10		0	0
Cost of state benefits	5		5		5	5
Time = 23.5		180		191.5		
Tax collections		0	0	11.5		5.75
Cost of state benefits		5.75	2.875	5.75		2.875

And, of course, the identical result obtains under the retail-sale-tax-only tax regime. In my illustration, Taxpayer #1 is undercharged. But once again, this does not imply that the state's overall budget is in deficit. Thus, suppose Taxpayer #2 has a consumption and production pattern that is essentially the reverse of that of Taxpayer #1: Taxpayer #2 initially spends $90 on consumption plus $10 on the retail sales tax, all funded by borrowing, and 23.5 years later earns $200, which he uses to pay off his entire borrowing. Once again, note that the state does not at any time have an unbalanced budget. However, it has transferred wealth ($2 in terms of net present value or $4 in terms of future value) from Taxpayer #2 to Taxpayer #1.

Wealth Transfer under a Sales-Tax-Only Regime

	Taxpayer #1			Taxpayer #2		
	Income	Consumption	NPV	Income	Consumption	NPV
Time = 0	100				90	
Tax collections	0		0		10	10
Cost of state benefits	5		5		5	5
Time = 23.5		188		200		
Tax collections		12	6	0		0
Cost of state benefits		6	3	6		3

When the mere design of a state's tax regime causes an *unintended* transfer of wealth from one resident to another, it poses a problem. Why is the state rewarding either Taxpayer #1 or Taxpayer #2, as the case may be, and punishing the other? It is doing so for no reason at all. And that is the essence of unfairness. Fortunately for taxpayers, there is a self-help remedy that will overcome the unfairness. Indeed, it will overcome the unfairness even under circumstances where there is no systematic long-term unfairness, no systematic lifetime transfer of wealth from one resident to another, but merely a temporary unfairness, a temporary transfer of wealth from one resident to another. Unfortunately for states, reliance on such self-help remedy will lead to budgetary chaos.

E. Strategic Behavior on the Part of Taxpayers (Most Simple Case)

Return to the case above where the tastes and expectations for government expenditures do not vary over time; the government at all times spends $5 to provide goods and services that facilitate the earning of $100 of income, and at all times spends $5 to provide goods and services that facilitate $90 of consumption. But suppose that the state chooses to finance its expenditures solely with a 10% income tax. Taxpayer #1 earns $100 today and pays $10 of income tax, half in respect of state-

provided goods and services that facilitate his earning of the income, and half in the expectation that the state in the future will provide him with adequate goods and services to facilitate his consumption. Taxpayer #2 consumes $90 today and enjoys a temporarily free ride at the state's expense. Time passes, 23.5 years in all. At the end of this time, Taxpayer #1 spends $180 on consumption; the state in turn spends $10 to facilitate this consumption. Or at least it wants to.

But alas it may have no revenue. Why? The state was relying on its receipt of the income tax that Taxpayer #2 would pay when he earns the income he needs to earn to pay off the debt he incurred to finance his original consumption. Indeed, Taxpayer #2 could, as assumed above, earn $200, pay $20 of income tax, and thus clear the $180 required to pay off his debt. If he does this, all is well. But he may follow a different tack. Taxpayer #2 might observe that the state will only spend $10 for the goods and services that it provides in connection with his production of $200 of income. Since it is charging him $20 for these goods and services, it is overcharging him![18] Thus, Taxpayer #2 might cast a wistful eye at other states—he does, after all, have another 49 to choose from—to see if any of them offers a better balance between the costs it charges in connection with the production of income (i.e., its income tax) and the value of the goods and services it provides in connection with such production. If Taxpayer #2 finds another state with a cost-benefit balance that is more to his liking,[19] he might switch his residence to that state. And in that case, his original home state will not receive the revenue it expected to receive from him.

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[18] It does not matter that the state's $10 expenditure on goods and services might save Taxpayer #2 more than $20 of costs relative to the baseline of the state of nature, so that Taxpayer #2 still receives a net benefit even in the face of paying the tax. If the state can purchase the goods and services for $10, charging $20 is overcharging, pure and simple.

[19] For example, and most simply, Taxpayer #2 might find a state that offers an identical package of benefits, but that only charges – by means of its income tax – their actual cost of $10.

Strategic Behavior under an Income-Tax-Only Regime

	Taxpayer #1			Taxpayer #2		
	Income	Consumption	NPV	Income	Consumption	NPV
Time = 0	100				90	
Tax collections	10		10		0	0
Cost of state benefits	5		5		5	5
Time = 23.5		180		0		
Tax collections		0	0	0		0
Cost of state benefits		10 (?)	5 (?)	0		0

The analysis for a retail-sales-tax-only regime is similar. Taxpayer #1 earns $100 today and pays no income tax; the state expects that he will later spend this income and thus pay retail sales tax that among other things will effectively offset the $5 cost of the goods and services with which it currently provides him. Taxpayer #2 consumes $90 today, pays $10 of sales tax, and thus ensures balance in the state's current budget. Although he only receives $5 of state-provided goods and services in connection with his consumption, he does not mind; he expects that the state will give him a free ride when he later earns the income necessary to pay off his consumption-related debt. Time passes; 23.5 years in all. At the end of this time, Taxpayer #2 earns $200; the state spends $10 to facilitate his production of income. Or at least it wants to.

But again it may have no revenue. Why? The state was relying on its receipt of the retail sales tax that Taxpayer #1 would pay when he spends the income he previously earned. Indeed, Taxpayer #1 could, as assumed above, spend $180 on consumption and thus pay $20 of sales tax. If he does this, all is well. But he may not do this. Instead, Taxpayer #1 might observe that the state only spends $10 on the goods and services that it provides in connection with his $180 of consumption spending. Since it is charging him $20 for such goods and services, it is overcharging him! Thus, Taxpayer #1 might cast a wistful eye at other states—he too has another 49 to choose

from—to see if any of them offers a more favorable balance between the costs it charges in connection with the consumption of income (i.e., its sales tax) and the value of the goods and services it provides in connection with such consumption. If Taxpayer #1 finds a state with a cost-benefit balance more to his liking, he very well might switch his residence to that state. And in that case, his original home state will not receive the revenue it counted on receiving from him.

Strategic Behavior under a Sales-Tax-Only Regime

	Taxpayer #1			Taxpayer #2		
	Income	Consumption	NPV	Income	Consumption	NPV
Time = 0	100				90	
Tax collections	0		0		10	10
Cost of state benefits	5		5		5	5
Time = 23.5		0		200		
Tax collections		0	0	0		0
Cost of state benefits		0	0	10 (?)		5 (?)

F. Strategic Behavior on the Part of Taxpayers (Less Simple Case)

The foregoing illustration of the breakdown of a state's budget posited residents who in the given tax years either earned income or engaged in consumption, but not both. In the real world, many, or even most, individuals in most tax years both earn income and engage in consumption. Nonetheless, many individuals have tax years in which they are net earners of income and other tax years in which they are net consumers. Would this reality change the outcome of my analysis?

Suppose there are only three states (State 1, State 2, and State 3) and they are in all relevant ways identical. Each state initially has three residents: A1, B1, and C1 are the residents of State 1; A2, B2, and C2 are the residents of State 2; A3, B3, and C3 are the residents of State 3. Each resident named A is a net

income producer: he earns 10% more income than the average individual, but consumes 10% less than the average individual. Each resident named B is neither a net income producer nor a net consumer: he earns and consumes the same amount as the average individual. And each resident named C is a net consumer: he earns 10% less income than the average individual, but consumes 10% more than the average individual.

Initial Distribution of Income and Consumption

	State 1			State 2			State 3	
	Income	Consumption		Income	Consumption		Income	Consumption
A1	110	90	A2	110	90	A3	110	90
B1	100	100	B2	100	100	B3	100	100
C1	90	110	C2	90	110	C3	90	110

Each state wants to provide benefits to both its income producers and consumers. Moreover, each state envisions identical expenditures with respect to income and consumption: it would like to spend an amount equal to 5% of income in ways that will benefit the production of income, and it would like to spend an amount equal to 5.55% of consumption in ways that will benefit consumers. However, each state opts for a different financing scheme. State 1 imposes solely a 10% income tax to fund its benefits expenditures; State 2 imposes both a 5% income tax and a 5.55% consumption (sales) tax; and State 3 imposes solely an 11.1% consumption (sales) tax. The following table sets forth each individual's tax payments.

Initial Distribution of Tax Payments

	State 1			State 2			State 3	
Resident	Income Tax	Sales Tax	Resident	Income Tax	Sales Tax	Resident	Income Tax	Sales Tax
A1	-11		A2	-5.5	-4.5	A3		-9
B1	-10		B2	-5	-5	B3		-10
C1	-9		C2	-4.5	-5.5	C3		-11

I initially assume that state spending is only marginally efficient: each dollar spent by the state provides its intended beneficiary with a dollar's worth of benefit. Under this assumption, the following table sets forth the benefit each individual receives from state expenditures, with the benefit divided into the benefit received with respect to income producing activity and the benefit received with respect to consumption activity.

Initial Distribution of Benefits

	State 1			State 2			State 3	
	Earning Benefit	Consuming Benefit		Earning Benefit	Consuming Benefit		Earning Benefit	Consuming Benefit
A1	5.5	4.5	A2	5.5	4.5	A3	5.5	4.5
B1	5	5	B2	5	5	B3	5	5
C1	4.5	5.5	C2	4.5	5.5	C3	4.5	5.5

Finally, the following table shows the net effect of tax payments and benefits receipts for each individual, i.e., the amount of wealth transferred to or from each individual as a result of the states' tax-and-spend policies.

Initial Distribution of Unintended Wealth Transfers

	State 1		State 2		State 3
	Net Benefit		Net Benefit		Net Benefit
A1	-1	A2	0	A3	1
B1	0	B2	0	B3	0
C1	1	C2	0	C3	-1

Suppose there is a fair deal of resistance to moving (after all, moving is a costly enterprise), even in the face of an unfavorable balance of taxes and benefits. Thus, I assume that a resident of one state will only move to another state if he can improve his net benefit profile by an amount greater than 1. Under this assumption, A1 migrates from State 1 to State 3 and C3 migrates from State 3 to State 1. The following table shows the new alignment of individuals.

Intermediate Distribution of Income and Consumption

	State 1			State 2			State 3	
	Income	Consumption		Income	Consumption		Income	Consumption
			A2	110	90	A1, A3	110	90
B1	100	100	B2	100	100	B3	100	100
C1, C3	90	110	C2	90	110			

Following the migration, each state attempts to maintain its original tax-and-spend policy. The first part of this attempt is easy: State 1 continues to impose a 10% income tax; State 2 continues to impose both a 5% income tax and a 5.55% sales tax; and State 3 continues to impose an 11.1% sales tax. The following table sets forth each individual's new tax payments.

Intermediate Distribution of Tax Payments

	State 1			State 2			State 3	
Resident	Income Tax	Sales Tax	Resident	Income Tax	Sales Tax	Resident	Income Tax	Sales Tax
			A2	-5.5	-4.5	A1, A3		-9
B1	-10		B2	-5	-5	B3		-10
C1, C3	-9		C2	-4.5	-5.5			

Now, a snag arises. State 1 would like to spend $30 on benefits ($5 to facilitate B1's income production; $4.50 to facilitate each of C1's and C3's income production; $5 to facilitate B1's consumption; and $5.50 to facilitate each of C1's and C3's consumption), but it only collects $28 of tax revenue. Thus, State 1 must make an accommodation: I assume that it reduces its desired spending across the board by the fraction 28/30. For similar reasons, State 3 will also need to curtail its spending by a like amount. The following table shows the benefit that the individuals now receive.

Intermediate Distribution of Benefits

	State 1			State 2			State 3	
	Earning Benefit	Consuming Benefit		Earning Benefit	Consuming Benefit		Earning Benefit	Consuming Benefit
			A2	5.5	4.5	A1, A3	5.137	4.203
B1	4.67	4.67	B2	5	5	B3	4.67	4.67
C1, C3	4.203	5.137	C2	4.5	5.5			

And the following table shows the net effect of tax payments and benefits receipts for each individual in light of the first wave of migration.

Intermediate Distribution of Unintended Wealth Transfers

	State 1		State 2		State 3
	Net Benefit		Net Benefit		Net Benefit
		A2	0	A1, A3	0.33
B1	-0.66	B2	0	B3	-0.66
C1, C3	0.33	C2	0		

Alas, with the passage of time, individual resistance to relocation is sure to decrease. Thus, I assume there will be a second wave of migration, with individuals relocating so long as they can improve their net benefit position by an amount greater than 0.5. Under this assumption, B1 moves from State 1 to State 2, and B3 moves from State 3 to State 2. Note that States 1 and 3 have now lost population, while State 2 has gained population. The following table shows the new alignment of individuals.

Final Distribution of Income and Consumption

	State 1			State 2			State 3	
	Income	Consumption		Income	Consumption		Income	Consumption
			A2	110	90	A1, A3	110	90
			B1, B2, B3	100	100			
C1, C3	90	110	C2	90	110			

Following this migration, each state once again attempts to maintain its prior tax-and-spend policy. And once again, the first part of this attempt is easy: State 1 continues to impose a 10% income tax; State 2 continues to impose both a 5% income tax and a 5.55% sales tax; and State 3 continues to impose an 11.1% sales tax. The following table sets forth each individual's new tax payments.

Final Distribution of Tax Payments

	State 1			State 2			State 3	
Resident	Income Tax	Sales Tax	Resident	Income Tax	Sales Tax	Resident	Income Tax	Sales Tax
			A2	-5.5	-4.5	A1, A3		-9
			B1, B2, B3	-5	-5			
C1, C3	-9		C2	-4.5	-5.5			

This set of tax collections poses the same problem encountered in the prior iteration. State 1 would ideally like to spend $20 on benefits ($4.50 to facilitate each of C1's and C3's income production; and $5.50 to facilitate each of C1's and C3's consumption), but it only collects $18 of tax revenue. Thus, State 1 must make an accommodation: I assume that it further reduces its spending across the board to 18/20 of the ideally desired amount. For similar reasons, State 3 will also need to curtail its spending, with the ultimate effect that it too will spend 18/20 of the ideally desired amount. The following table shows the benefits that the individuals receive in light of these accommodations.

Final Distribution of Benefits

	State 1			State 2			State 3	
	Earning Benefit	Consuming Benefit		Earning Benefit	Consuming Benefit		Earning Benefit	Consuming Benefit
			A2	5.5	4.5	A1, A3	4.95	4.05
			B1, B2, B3	5	5			
C1, C3	4.05	4.95	C2	4.5	5.5			

The following table shows the net effect of tax payments and benefits receipts for each individual in light of both waves of

migration. Note, importantly, that the net benefit that State 1 temporarily, albeit *inadvertently*, provided to consumers has evaporated, as has the net benefit that State 3 temporarily, albeit *inadvertently*, provided to income producers.

Final Distribution of Unintended Wealth Transfers

	State 1		State 2		State 3
	Net Benefit		Net Benefit		Net Benefit
		A2	0	A1, A3	0
		B1, B2, B3	0		
C1, C3	0	C2	0		

Also, note that a lingering effect of a state's attempt to impose asymmetric taxes is that such state attracts disproportionate numbers of individuals who disproportionately benefit from its asymmetric tax structure. At the end of the day, this means that such state will generate less per capita tax revenue than it would have generated absent the asymmetry and the resulting taxpayer migration. It follows that if such state's benefit spending is efficient—i.e., that a dollar of spending provides at least a dollar of benefit, and possibly a lot more—the residents of such states will suffer relative to the residents of states without asymmetric tax structures.[20] For example, suppose in the relevant spending range, that each $1 spent by a state on benefits provides residents with benefits that they privately value at $1.50. The following table shows the benefits that the individuals in the last iteration above would receive in light of this multiplier.

[20] Of course, if the state's benefit spending is inefficient, a lower level of per capita spending is an affirmative good.

Final Distribution of Gross Benefits if Spending is Efficient

	State 1			State 2			State 3	
	Earning Benefit	Consuming Benefit		Earning Benefit	Consuming Benefit		Earning Benefit	Consuming Benefit
			A2	8.25	6.75	A1, A3	7.425	6.075
			B1, B2, B3	7.5	7.5			
C1, C3	6.075	7.425	C2	6.75	8.25			

And the following table shows the net effect of tax payments and benefits receipts for each individual in light of the multiplier. Note that under these assumptions, if the net benefit threshold for migration falls a tiny bit further, so that individuals migrate whenever they can improve their net benefit by an amount at least equal to 0.5, the remaining residents of States 1 and 3 will migrate to State 2. States 1 and 3 would be empty!

Final Distribution of Net Benefits if Spending is Efficient

	State 1		State 2		State 3
	Net Benefit		Net Benefit		Net Benefit
		A2	5	A1, A3	4.5
		B1, B2, B3	5		
C1, C3	4.5	C2	5		

G. Conclusion

If a state *unwittingly* transfers wealth from one taxpayer to another, even only temporarily, it is not merely acting "unfairly," it is also acting in a self-defeating manner. That is, unless every other even remotely comparable state adopts essentially identical policies, some taxpayers will choose to move or threaten to move to take advantage of the irrationality of the

state's tax-and-spend policies, thereby plunging the state into budgetary chaos. In effect, the state will lose the ability to fully and rationally determine the level of its expenditures; instead, it will cede control of such expenditures to (the most mobile of) its residents.

III.: COMPLICATING FACTORS

As the foregoing model of state finances paints a simplified picture of reality in a number of significant respects, it is worth asking whether any of these simplifications casts serious doubt on its conclusion. Among the potentially complicating factors I will consider when addressing this question are: (1) the effect of federal grants, (2) the effect of federal income tax rules, in particular I.R.C. § 164's deduction for certain state and local taxes, (3) the effect of local government actions on the choice of where to live, (4) the absolute and relative efficiency of state and local expenditures, (5) the effect of the possible capitalization of taxes or benefits into asset prices, and (6) the relevance of the difference between active income and passive income and hence of active income producers and passive investors. This part will also address the question of whether the mere existence of a state income tax inevitably leads to higher overall levels of taxation (and hence perhaps to waste).

A. Basic Relationships

In Part II, I posited a relationship—purely for illustrative purposes—between state spending and the cumulative cost savings enjoyed by an income producer as a result of such spending. I now denote cost savings as CSI; CSI is a generally increasing function of state spending SI (although a level may be reached where additional state spending becomes counterproductive); I can therefore write CSI(SI). SI, in turn, is the sum of a fraction α of income taxes IT collected, a fraction β of consumption taxes CT collected, and a fraction γ of federal grants F received,[21] so that $SI = \alpha IT + \beta CT + \gamma F$. Thus, I can

[21] This list of sources of state revenue is not technically exhaustive, but can be treated as if it is. Hence, in what follows, miscellaneous sources of revenue are included

write $CSI(\alpha IT + \beta CT + \gamma F)$.[22] Since income taxes are a cost to an income producer, a resident income producer's net benefit from state spending and taxation is $CSI(\alpha IT + \beta CT + \gamma F) - IT$.

All else being equal, the last expression above is what an income producer hopes (and seeks) to maximize.[23] On balance, he is happier when relevant state spending is higher (so long as it is not so high that it actually becomes counterproductive), but is happier still if such state spending is borne by others, whether consumers or the federal government. In the simplest case in which all states possess the same technology for turning spending into cost savings and all states in fact choose the same level of spending, an income producer will prefer the state that funds its spending with the smallest amount of income taxes.

Of course, a parallel analysis can be undertaken for consumers. Cost savings CSC is a generally increasing function of state spending SC (although a level may be reached where additional state spending becomes counterproductive); I can therefore write CSC(SC). SC in turn is the sum of a fraction $(1 - \alpha)$ of income taxes IT collected, a fraction $(1 - \beta)$ of consumption taxes CT collected, and a fraction $(1 - \gamma)$ of federal grants F, so that $SC = (1 - \alpha)IT + (1 - \beta)CT + (1 - \gamma)F$. Thus, I can write $CSC((1 - \alpha)IT + (1 - \beta)CT + (1 - \gamma)F)$. Since consumption taxes are a cost to a consumer, a resident consumer's net benefit from state spending and taxation is $CSC((1 - \alpha)IT + (1 - \beta)CT + (1 - \gamma)F) - CT$.

All else being equal, the last expression above is what a consumer seeks to maximize.[24] On balance, he too is happier when relevant state spending is higher (so long as it is not so high that it actually becomes counterproductive), but is happier still if such state spending is borne by others, whether income producers or the federal government. In the simplest case, in

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in whichever category they best fit. For example, a tax that is largely imposed on non-residents will be included in F (since it feels like free money to residents of the state).

[22] When $\alpha = 1$ and $\beta = 0$, the state is not transferring wealth either from income producers to consumers or from consumers to income producers.

[23] To maximize income, one must minimize costs (at any given level of gross income); minimizing costs is equivalent to maximizing cost savings.

[24] To maximize consumption, one must minimize costs (at any given level of gross consumption); minimizing costs is equivalent to maximizing cost savings.

which all states possess the same technology for turning spending into cost savings, and all states in fact choose the same level of spending, a consumer will prefer the state that funds its spending with the smallest amount of consumption taxes.

Of course, what ultimately matters is not what any one state does in a vacuum, but how what that state does relates to what other comparable states do. For example, if all states spend only for the benefit of income producers but also impose similar amounts of sales tax on consumers, consumers will have no ability to flee from one state to another to avoid this structural "unfairness." And if all states take all federal receipts and spend them solely for the benefit of consumers, there will be no ability for an income producer to move to counteract this structural "unfairness." Rather, mobility on the part of income producers or consumers matters only if (1) different states provide different levels of benefits to either income producers or consumers or both, and/or (2) different states fund in different ways the benefits they provide to income producers or consumers or both.

B. Federal Grants

First, I examine the effect of federal grants on a state's budget process. Contrary to my model in Part II, the fifty states do not, in fact, limit their expenditures to the amount of their tax collections, not by a long shot. For example, in 2003, per capita spending by the states was $4,010 per person.[25] However, per capita tax collections were only $2,026.[26] The lion's share of the difference was amounts received from the federal government.[27]

Perhaps not surprisingly, given the effects of political influence and the like, there is a wide variation in the amount of funds that states receive from the federal government. In 2004,

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[25] U.S. CENSUS BUREAU, Statistical Abstract of the United States: 2007, 288 *available at* http://www.census.gov/compendia/statab/2007/2007edition.html (last visited Feb. 23, 2009).

[26] *Id.* at 286.

[27] *Id.* at 285.

on a per capita basis, these amounts ranged from a low of $672 per person in Nevada to a high of $3,778 per person in Wyoming. Nonetheless, twenty-one of the fifty states received per capita amounts within 10% of the average of $1,276, while another eleven states received per capita amounts within 20% of such average. Surprisingly, however, only two of the five most populous states were "near" the average:

Per Capita Revenue from Federal Government

California	$ 1,271
Texas	$ 1,106
New York	$ 2,138
Florida	$ 955
Illinois	$ 995

What is the effect of federal grants on the analysis in Part II? The arithmetic model set forth above helps answer this question. Thus, a resident income producer seeks to maximize his net benefit—$CSI(\alpha IT + \beta CT + \gamma F) - IT$—from state spending and taxation. Similarly, a resident consumer seeks to maximize his net benefit—$CSC((1 - \alpha)IT + (1 - \beta)CT + (1 - \gamma)F) - CT$—from state spending and taxation. It follows that so long as γ is neither equal to 0 or 1, so that both income producers and consumers derive some benefit from federal grants, both income producers and consumers will prefer a higher per capita level of federal grants. A free lunch is always preferable to a paid lunch.

That being said, it is nonetheless the case that every state should pursue a structurally sound tax-and-spend strategy, whatever its level of federal grants. The reason for this is that a structurally sound strategy will withstand the fickle vicissitudes of federal spending. Sometimes a state will be blessed with a particularly effective congressional delegation and will reap a surfeit of pork; other times it may be burdened with a particularly ineffective delegation and the pork will (relatively speaking) dry up. Thus, only a foolish state will seek to rely on allocations of generally unpredictable federal grants to mend a structurally unsound tax-and-spend strategy.

What follows is a concrete illustration in the context of

three states—Kentucky, Georgia and Tennessee—that are assumed to be equivalent in all relevant ways, except for their tax-and-spend strategies. Kentucky has higher per capita spending and therefore is deemed to provide greater per capita benefits than Georgia and Tennessee; Georgia and Tennessee in turn provide similar levels of per capita benefits, but fund them in radically different ways. To wit, in 2003, Kentucky's per capita spending was $4,094, Georgia's was $3,376, and Tennessee's was $3,317.[28] Kentucky collected $2,043 per capita in taxes, almost exactly evenly divided between income taxes ($1,018) and consumption taxes ($1,025).[29] Georgia, in turn, collected $1,634 per capita in taxes, with a slightly larger fraction coming from income taxes ($870) than from consumption taxes ($764).[30] Tennessee collected $1,617 per capita in taxes, of which the lion's share came from consumption taxes ($1,301), since Tennessee does not have a broad-based individual income tax.[31] Finally, Kentucky had per capita federal receipts totaling $2,051; Georgia's per capita federal receipts amounted to $1,742; and Tennessee's were $1,700.[32]

Suppose that all three states attempt to balance their spending equally between items that benefit income producers and those that benefit consumers. Under this assumption, Kentucky spends $2,047 on behalf of each income producer and

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[28] *Id.* at 288.

[29] *Id.* at 286. Kentucky's total tax collections amounted to $8,463 million, of which $4,006 million were sales taxes of various sorts, $238 million were generally consumption related license taxes (motor vehicles and hunting), $3,459 million were income taxes of various sorts, and the remainder were business-related property taxes and business-related license taxes. *Id.* at 286-87. Thus, Kentucky can be treated as collecting almost exactly half of its taxes from consumption and half from income production.

[30] *Id.* at 286. The division of taxes into consumption taxes and income taxes for Georgia follows precisely the division for Kentucky.

[31] *Id.* .

[32] *Id.* at 285. Actually, Kentucky had per capita federal receipts totaling $1,423; Georgia's per capita federal receipts totaled $1,014; and Tennessee's were $1,489. However, as noted above, all items that are not taxes imposed on residents are included in the federal receipts category. Thus, for each state, the amount of per capita federal receipts for purposes of this paper is the excess of per capita state spending over per capita state tax collections.

each consumer; Georgia in turn spends $1,688 apiece; and Tennessee spends $1,659 apiece.

Finally, because money is fungible, essentially any assumption can be made as to how the states match inflows and outflows. For example, I could assume that each state puts all of its available revenue, from whatever source derived, into a single pot, and then takes funds out of that pot in order to pay for its spending. In that case, given my assumptions about uses of funds, exactly 50% of all income tax revenue would be devoted to spending for the benefit of income producers; exactly 50% of all consumption tax revenue would be devoted to spending on behalf of income producers; and so on. However, I will not make this assumption. Instead, I will assume that each state, to the greatest extent possible, funds spending for the benefit of income producers from income tax revenue and spending for the benefit of consumers from consumption tax revenue; it then uses all remaining revenue to fill the gaps that remain.

Thus, Kentucky devotes all of its $1,018 of per capita income tax revenue to provide benefits for income producers, devotes all of its $1,025 of per capita consumption tax revenue to provide benefits for consumers, and uses its federal grants to pay for $1,029 and $1,022 of additional per capita benefits for income producers and consumers, respectively. Georgia devotes all of its $870 of per capita income tax revenue to provide benefits for income producers, devotes all of its $764 of per capita consumption tax revenue to provide benefits for consumers, and uses its federal grants to pay for $818 and $924 of additional per capita benefits for income producers and consumers, respectively. Finally, Tennessee devotes all of its $316 of per capita income tax revenue to provide benefits for income producers, devotes all of its $1,301 of per capita consumption tax revenue to provide benefits for consumers, and uses its federal grants to pay for $1,343 and $358 of additional per capita benefits for income producers and consumers, respectively.

Note that under the foregoing allocation scheme, no state, not even Tennessee, directly diverts revenue either from income producers to consumers or from consumers to income producers.

However Tennessee does so in effect. To see this, and what effect it has on behavior, insert the foregoing numbers into the net benefit function. A Kentucky income producer receives a net cost saving of $CSI(IT_{KY} + 0.502F_{KY})—IT_{KY}$ = CSI($2047)—$1018 and a Kentucky consumer receives a net cost saving of $CSC(CT_{KY} + 0.498F_{KY})—CT_{KY}$ = CSC($2047) - $1025. A Georgia income producer realizes a net cost saving of $CSI(IT_{GA} + 0.470F_{GA})—IT_{GA}$ = CSI($1688)—$870 and a Georgia consumer realizes a net cost saving of $CSC(CT_{GA} + 0.530F_{GA})—CT_{GA}$ = CSC($1688)—$764. Finally, a Tennessee income producer realizes a net cost saving of $CSI(IT_{TN} + 0.790F_{TN})$ - IT_{TN} = CSI($1659)—$316 and a Tennessee consumer realizes a net cost saving of $CSC(CT_{TN} + 0.210F_{TN})—CT_{TN}$ = CSC($1659)—$1301.

Given the foregoing, an income producer who has equivalent opportunities in Kentucky and Tennessee will almost surely prefer earning income in Tennessee, since although he will receive somewhat smaller cost savings in Tennessee (however much cost saving an extra $388 of government spending will buy), he will incur significantly lower tax costs there ($702).[33] On the other hand, a consumer who has equivalent opportunities in those two states will clearly prefer consuming in Kentucky, since he will both receive greater cost savings (however much cost saving an extra $388 of government spending will buy) and incur lower tax costs ($276) in Kentucky. Meanwhile, an income producer who has equivalent opportunities in Georgia and Tennessee will prefer earning income in Tennessee, since although he will receive slightly smaller cost savings in Tennessee (however much cost saving an extra $29 of government spending will buy), he will incur significantly lower tax costs there ($554). And a consumer who has equivalent opportunities in those two states will clearly prefer consuming in Georgia, since he will both receive greater cost savings (however much cost saving an extra $29 of government spending will buy) and incur significantly lower tax

[33] It is reasonable to assume that at the margin, state spending produces benefits roughly commensurate with costs. Thus, the added state benefits derived by an income producer in Kentucky should be somewhere in the neighborhood of $388, and hence nowhere near their effective relative "cost" to him of $702.

costs ($537) in Georgia.

All of this may well prove to be fatal to Tennessee's finances. This is because some persons who predominantly produce income—such as entrepreneurs and high wage earners—will opt to move to Tennessee to take advantage of Tennessee's relatively much more generous treatment of income producers, while some persons who predominantly consume—such as retirees—will opt to move to Kentucky or Georgia. If a great enough number of persons make these choices, then Tennessee will face high demand for government services beneficial *to income producers* but will have insufficient *consumption tax* revenue to pay for such services. Federal receipts by themselves will be unable to predictably fill in the hole. And so, in the long run, even Tennessee's attractiveness to income producers will wane. In short, unlike Kentucky and probably Georgia, Tennessee's finances are unstable.[34]

What can Tennessee do to overcome this instability? It has only two choices. First, it can change its tax collection policy by collecting a larger fraction of its revenue from income producers and a smaller fraction from consumers. If it does this, it will be somewhat less attractive to income producers, who will no longer be able to come to the state for as great of a free ride. Simultaneously, it will be slightly less unattractive to consumers, who will no longer be furnishing quite as great a free ride to income producers. If the change in tax collection policy is sufficiently great, stability might ensue.

Second, Tennessee could opt to change its benefits policy.

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[34] Kentucky and Georgia may at first blush appear to be unstable too because they will experience migrations opposite those of Tennessee. That is, some income producers will leave those states, not because those states treat them unfairly, but because Tennessee treats them too well. Some consumers will move to those states, not because those states treat them so well, but because Tennessee treats them unfairly. But neither of these migratory flows need be a concern, since Kentucky's and Georgia's spending and taxation can adjust to handle them. That is, both states can *always* simply provide services to each group based on the amounts they charge each group. Thus, if and when there are fewer income producers, Kentucky and Georgia will collect less in income tax and can simultaneously reduce their expenditures for the benefit of income producers in like amount, which would be a perfectly logical response since there would be fewer income producers clamoring for benefits. And an identical analysis holds with respect to consumers.

That is, it could decide to forego providing an identical amount (in terms of cost) of benefits for both income producers and consumers, and could instead devote a larger share of its spending to consumers. Once again, such a change would make Tennessee less attractive to income producers and more attractive to consumers, and thus would stem the flow of migrants.

C. Internal Revenue Code Section 164

Pursuant to I.R.C. § 164, taxpayers are allowed to deduct certain state taxes when determining their federal taxable income. For purposes that are relevant to my discussion, these taxes include income tax or alternatively, for taxable years between 2004 and 2008, at the election of the taxpayer, general sales tax.[35] In general, a deduction of state income or sales tax will reduce the ultimate cost of paying such tax by the amount of the federal income tax that is saved as a result of the deduction. For example, if δ is the marginal federal income tax rate for a given taxpayer, and thus the fraction of such taxpayer's federally deducted state tax effectively rebated by the federal government, then $(1 - \delta)$IT is the true cost of his state income tax payment if and only if he chooses to (and is able to) deduct such income tax payment, and $(1 - \delta)$CT is the true cost of his state sales tax payment if and only if he instead chooses to (and is able to) deduct such sales tax payment.

What does this mean for Kentucky, Georgia, and Tennessee? Note first that a Kentucky resident will generally choose to deduct his state income tax if he is predominantly an income producer, but will choose to deduct his state sales tax if he is predominantly a consumer. A Georgia resident, in contrast, will be somewhat predisposed to deducting his state income tax; only if he consumes in amounts significantly in excess of his income will he benefit from instead deducting his state sales tax. Finally, a Tennessee resident will generally deduct his state sales tax whether he is predominantly an income producer or a consumer. Plugging the effect of these

[35] I.R.C. §§ 164(a)(3) and (b)(5) (2008).

deductions into the cost savings equations, average income producers in Kentucky and Georgia realize cost savings of CSI($2047)—(1 - δ)($1018) and CSI($1688) - (1 - δ)($870), respectively, while average income producers in Tennessee realize cost savings of CSI($1659) - $316.[36] From this it follows that average income producers will almost surely continue to prefer Tennessee to Georgia, but may or may not also continue to prefer Tennessee to Kentucky.[37]

Meanwhile, average consumers in Kentucky realize cost savings of CSC($2047)—$1025 if they do not find it in their interest to deduct their state sales tax on their federal income tax return and CSC($2047)—(1 - δ)($1025) if they do find it in their interest to deduct such tax; average consumers in Georgia realize cost savings of CSC($1688)—$764 since they generally do not find it in their interest to deduct their state sales tax on their federal income tax return; and average consumers in Tennessee uniformly realize cost savings of CSC($1659)—(1 - δ)($1301). In spite of the available federal deduction for sales tax payments, the average Tennessee consumer will almost surely continue to prefer Kentucky's regimen of costs and benefits (whether or not he elects to deduct Kentucky sales tax).[38] Similarly, the average Tennessee consumer will prefer

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[36] For reasons explained below, an average Kentuckian is likely to deduct his state income tax, notwithstanding the fact that he might pay slightly more state sales tax than income tax.

[37] For example, if the relevant marginal federal income tax rate δ = 0.2, a Kentuckian would incur incremental tax costs vs. his Tennessee compatriot of $498 and would receive incremental benefits that cost $388. If state spending at the relevant margin is not too efficient, the Tennessee trade-off would be preferable; if state spending is relatively efficient, the Kentucky trade-off would be preferable. And one can easily imagine marginal federal income tax rates where Kentucky would have a clear advantage. For example, if δ = 0.31, a Kentuckian would incur incremental tax costs vs. his Tennessee compatriot of only $386 and would receive benefits that cost a couple dollars more. In such case, the Kentucky option would almost surely be preferable.

[38] For example, if the relevant marginal federal income tax rate δ = 0.2, a Tennessean would still incur $16 of incremental sales tax cost vs. his Kentucky brethren who opt not to deduct their Kentucky sales tax, but would be deprived of benefits costing $388. Even if the relevant marginal federal income tax rate were increased to δ = 0.31, a Tennessean would still long for Kentucky. In such case, he would save $127 of sales tax cost by remaining in Tennessee, but would continue to be deprived of benefits costing $388.

Georgia's regimen of costs and benefits.[39]

Thus, while the current incarnation of section 164 may somewhat mitigate the temptation of Tennessee's consumers to flee to Kentucky and Georgia, it will not succeed in stopping most of such flight. Thus, Tennessee will continue to be unable to stabilize her finances; income producers will continue to flock to the state demanding benefits; and consumers will continue to flee the state and thus deprive it of the funding necessary to pay for such benefits.

Before leaving the subject of section 164, it is worth pointing out that for a number of reasons its effect on behavior is far smaller than even the prior discussion would suggest. First, in the case of any taxpayer who opts to deduct sales tax rather than income tax (thus including the Tennessee taxpayers in the prior paragraphs), truly extraordinary record-keeping is required to achieve the maximum level of allowable deduction. In recognition of this fact, any such taxpayer is allowed to take a deduction calculated by the Treasury Department to reflect "average consumption."[40] By definition, this amount will be too low for taxpayers who spend an unusually high percentage of their income (e.g., it will be systematically too low for young couples establishing their first households and for retirees who are living off saved capital) and will be too high for taxpayers who spend an unusually low percentage of their income (e.g., it will be systematically too high for empty nesters who have shifted their focus to saving for retirement).[41] Thus, such taxpayers will receive unintentionally incorrect deductions, which will muddy the effect of section 164.[42]

Second, section 164 deductions are so-called itemized deductions and as such are limited in a number of ways. For

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[39] For example, even if the relevant marginal federal income tax rate is set as high as $\delta = 0.31$, a Tennessean would still incur $134 of sales tax cost above and beyond that which he would incur in Georgia; he will receive no offsetting benefits, since Georgia actually provides slightly greater consumer benefits than Tennessee in any event.

[40] I.R.C. § 164(b)(5)(H)(ii)(II) (2008).

[41] *Cf.* Herwig J. Schlunk, *A Lifetime Income Tax*, 25 VA. TAX REV. 939 (2006).

[42] In the case of Tennessee, the bias against those – in particular, retirees – who consume disproportionately large percentages of their income, will be increased.

taxpayers who do not have any significant amount of itemized deductions, such deductions are valueless, since the taxpayers will instead elect to take the federal standard deduction.[43] For taxpayers who have a significant amount of income, and hence in general a significant amount of state tax payments and other itemized deductions, the amount of such deductions that are allowed in the calculation of federal taxable income is subject to a phase-out.[44] Both these rules limit the benefits of the section 164 deduction, and hence push taxpayers in the direction of making decisions that are less distorted by the effects of such deduction.

Third, for the rapidly increasing percentage of mostly middle and upper income taxpayers who are subject to I.R.C. § 55's alternative minimum tax, no deduction is allowed for state tax payments.[45] Thus, for such taxpayers, the value of the federal income tax deduction for state income or sales tax is 0. Hence, such taxpayers will make residency and migration decisions utterly undistorted by the effects of the interaction of the federal income tax and the state tax structure.

The bottom line is that the section 164 federal income tax deduction somewhat haphazardly reduces the cost, but not the benefit, of some state spending.[46] A state might be tempted to use this fact strategically: it might attempt to further benefit its residents by imposing on them, to the maximum practicable extent, only taxes that are deductible for federal income tax purposes. Prior to 2004, a state engaging in such strategy would have relied predominantly on an income tax; in the period from 2004 to 2008, it would have relied either predominantly on an income tax or predominantly on a sales tax; and beginning in 2009, assuming no extension of the current election, it would

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[43] I.R.C. § 63(c) (2008).

[44] I.R.C. § 68.

[45] I.R.C. § 56(b)(1)(A)(ii) (2008).

[46] To make this claim it is also necessary to assume that federal disbursement to states are not systematically reduced to reflect the loss of tax receipts from taxpayers residing in such states as a result of the section 164 deduction. I am not aware of any evidence that suggests that federal disbursements to states are higher for states that impose lower levels of state tax and that hence impose less "cost" on the Treasury.

once again rely predominantly on an income tax. Unfortunately, such an attempt by a state to benefit its residents is problematic.

First, in the case of a state that engages in flip-flopping—switching from income tax collections to sales tax collections and back to income tax collections in response to winds from Washington—its residents will never know exactly what to expect, and will thus be unable to effectively plan their economic activity (whether income-producing activity or consumption activity). This uncertainty is likely to accelerate rather than retard outbound migration.

Second, even if a state does not alter its tax collection strategy in response to Washington, but simply tries to maximize its residents' deductions through each change to section 164 by uniformly collecting predominantly an income tax, such strategy will still, as noted above, result in a significant (albeit possibly unintentional) transfer of resources from income producers to consumers and thus, so long as other comparable states do not follow identical strategies, to an outflow of income producers and an inflow of consumers and, in the long run, to budgetary instability.[47] Thus, although it leaves some federal money on the table, a state is best served by determining its tax collection policy on the basis of its spending policy, and not on the basis of federal income tax policy.[48]

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[47] Of course, the very worst strategy for a state is to impose asymmetric taxation that is predominantly of a type that is not deductible for federal income tax purposes, as such strategy leads to a great transfer of resources from one group of residents to another but does so without any compensating benefit in the form of a partial indirect refund of outlays from the federal government. This is precisely the sin of states like Tennessee that have long gone without a broad-based income tax.

[48] States as a whole would be best served if the federal government got out of the business of indirectly affecting state tax policy by means of section 164. An optimal federal policy would either repeal the deduction for state taxes, whether income taxes or sales taxes, or allow a deduction for all state taxes, including both income taxes and sales taxes. In either of these two cases, there would be no asymmetry between income taxes and sales taxes and state legislators would thus be able to have a completely clear conscience in ignoring deductibility issues when determining their tax policy.

D. Local Spending and Taxation

Most local governments engage in spending to provide benefits for local income producers and consumers.[49] This spending is largely a substitute for state spending: to the extent that a locality funds its own police force, the state will have less reason to provide such locality's residents with police protection; to the extent a locality funds its own schools, the state will have less reason to provide such locality's children with basic education; and so on.

There is good reason to believe that local government spending will generally be more efficient than state government spending: the closer the spending decision is to the ultimate beneficiaries, the more it can and will be tailored to their peculiar wants and needs. Phrased in the terminology of this paper, the "technology" employed by local governments to deliver benefits to local income producers and consumers will likely be superior to the technology employed by state governments.

This phenomenon can be illustrated by making the following modification to the benefits technology hypothesized in Table 1. It will continue to be the case that the first $1 spent by the state generates $5 of cost savings on the part of an income producer; the second $1 generates $4 of cost savings; and so on. However, as reflected in Table 2, to the extent that any $1 is spent not by the state, but instead by a local government, it will now generate an additional $1 of cost savings. Thus, if an income producer has a choice of two similar localities, and if in each locality he will be benefited and burdened with, for example, $6 of spending and taxes, but if in the first locality a higher proportion of the spending is administered by the local government, he will prefer such locality, since the net cost savings he receives from the combination of state and local spending will be greater.[50]

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[49] Per capita spending by local governments in 2002 (the last year reported) amounted to $3,959, while per capita spending by state governments totaled $4,010. *See* U.S. CENSUS BUREAU, *supra* note 26, at 288, 292.

[50] To be concrete, suppose that in Locality #1, the local government spends $4 and

Table 2: Local and State Benefits Technology

Marginal Local and State Spending	Cumulative Local and State Spending	Marginal Cost Savings	Cumulative Cost Savings—Only Local Spending	Cumulative Cost Savings—Only State Spending
1	1	6 or 5	6	5
1	2	5 or 4	11	9
1	3	4 or 3	15	12
1	4	3 or 2	18	14
1	5	2 or 1	20	15
1	6	1 or 0	21	15
1	7	0 or -1	21	14

Does the higher efficiency of local spending mean that income producers and consumers as a whole would be better served if state governments essentially ceded spending and taxation determinations to local governments? Unfortunately, it does not. The main reason for this somewhat surprising answer is that localities, like states, compete with one another for income producers and consumers. To attract income producers and consumers, they tend to lower taxes to a point that is suboptimal, i.e., to a point which does not provide adequate revenues for the provision of beneficial—i.e., efficient—public goods.[51] To the extent that a state taxes and spends on behalf of its local governments, it can counteract this tendency and mitigate the harmful effects of tax competition between its local governments.

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the state government spends $2, while in Locality #2, the local government spends $3 and the state government spends $3. In such case, the income producer will receive a benefit worth $19 in Locality #1, but a benefit worth only $18 in Locality #2.

[51] "A central message of the tax competition literature is that independent governments engage in wasteful competition for scarce capital through reduction in tax rates and public expenditure levels." John Douglas Wilson, *Theories of Tax Competition*, 52 NAT'L TAX J. 2, 269-304 (1999). *See also* Richard Baldwin and Paul Krugman, *Agglomeration, Integration and Tax Harmonization*, Nat'l Bureau of Econ. Research, Working Paper No. 9290, 2002, *available at* http://www.nber.org/papers/w9290 (last visited Feb. 23, 2009).

For example, in Table 2, one could imagine a local government, competing with other local governments but left to its own devices with respect to taxation and spending, imposing an income tax (or equivalent property tax) of $2 on income producers, from which such income producers would reap a cost savings of $11, or an after-tax net benefit of $9.[52] Such same local government, still competing with other local governments but having a backstop of $3 of state taxation and (unfortunately somewhat less efficient) state spending, might choose to impose an income tax (or equivalent property tax) of $1 on income producers. If so, the local tax burden would be lower, but of course the aggregate state and local tax burden would be higher. Significantly, the concomitant aggregate state and local spending level will be closer to the optimum and so the income producer will actually be better off: he will reap cost savings of $15, or an after-tax net benefit of $11.

There is also another reason why a state should not cede all taxation and spending decisions to local governments: there are some decisions that are best made with a big picture, rather than a small picture, in mind. Thus, a state government will be better able than a local government to coordinate spending on such infrastructure as road systems: good roads in Memphis and Nashville will be of little benefit to businesses attempting to ship goods from one city to the other if there are not also good roads in the localities between Memphis and Nashville. Similar coordination issues arise with all manner of state spending.

While the fact of local taxation and spending will not obviate the need for state taxation and spending, it will nonetheless, to some extent, mitigate the effects of any disproportion in such taxation and spending. In large part, this is because a typical local jurisdiction's tax and spend arsenal does not permit significant disproportion.

Of the tax revenues collected by local governments in 2002,

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[52] The reason it would engage in this clearly suboptimal strategy is that over the very short-run its residents are likely to be more sensitive to the level of taxes that they directly pay than to the level of spending on benefits that they only indirectly receive. The constant low-tax pandering will only with a lag lead to noticeably deteriorating infrastructure.

roughly 73% came from property taxes, while 17% came from sales taxes, and only 5% came from income taxes.[53] Moreover, while local property taxes constitute a large fraction of an average taxpayer's aggregate state and local tax bill (amounting to nearly 28% of the total), local sales taxes do not constitute a terribly large fraction of taxpayers' aggregate state and local *sales tax* bill (amounting to only 17% of that total), and local income taxes constitute an even smaller fraction of taxpayers' aggregate state and local *income tax* bill (amounting to only 9% of that total, and amounting to 0% in all but the handful of localities, most prominently New York City, that impose a local income tax).[54]

Are property taxes, like income taxes, taxes on income producers? Or are they, like sales taxes, taxes on consumers? The answer is that they are both. When a property tax is imposed upon a business, it is a tax on an income producer (in his capacity as such). When a property tax is imposed on a residence, it is a tax imposed on a consumer (in his capacity as such). Thus, a local jurisdiction that imposes a broad-based property tax (and they all do) will almost by definition impose a tax both on its resident income producers and on its resident consumers; its tax instrument is simply too blunt to spare one constituency at the expense of the other.

Moreover, a local jurisdiction's spending will generally not admit a significant disproportion either. In many cases this is obvious. In the case of a jurisdiction that is primarily business in character (e.g., a warehouse or factory district), taxes necessarily will be collected primarily from businesses, but spending necessarily will be primarily for the benefit of those very same businesses: there simply won't be anyone else upon whom to lavish spending. And the same result will hold in the case of a jurisdiction that is primarily residential in character. But what of a jurisdiction which contains significant numbers of both businesses and residences? Given the small size of the typical local jurisdiction, it will almost certainly be the case that

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[53] *See* U.S. CENSUS BUREAU, *supra* note 25, at 290.

[54] *See id.* at 288, 290.

most benefits spending will necessarily benefit both the income producers and the consumers in the jurisdiction. For example, a police patrol that passes businesses will almost inevitably pass residences as well. Thus, spending on the police patrol must properly be characterized as spending both for the benefit of income producers and for the benefit of consumers.[55]

The fact of local taxation and spending with its inherent built-in lack of disproportion—its fairness—ensures that some significant portion of the aggregate of state and local taxation and spending will be conducted proportionately. It does not, however, eliminate the need for a state to conduct its taxation and spending in a proportional way. To demonstrate this, I return to the example of Kentucky, Georgia, and Tennessee. In 2002, Kentucky localities collected per capita taxes of $686 and engaged in per capita spending of $1,528; Georgia localities collected per capita taxes of $1,204 and engaged in per capita spending of $2,448; and Tennessee localities collected per capita taxes of $894 and engaged in per capita spending of $2,619.[56] For purposes of analysis, I fit these numbers into my prior formulae by assuming that half of the tax collections come from income producers and that half of the expenditures are for the benefit of income producers; similarly for consumers.

Thus, an average Kentucky income producer realizes a net cost saving of CSI($2047 + $764)—($1018 + $343) = CSI($2811)—($1361) and an average Kentucky consumer receives a net cost saving of CSC($2047 + $764)—($1025 + $343) = CSI($2811)—($1368). An average Georgia income producer realizes a net cost saving of CSI($1688 + $1224)—($870 + $602) = CSI($2912)—($1472) and an average Georgia consumer realizes a net cost saving of CSC($1688 + $1224)—($764 + $602)

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[55] Of course, some such overlap is inevitable with respect to state spending as well. However, given the wider geographic reach of most states, the degree of overlap will often be less. For example, if a state concentrates its police patrols in areas that are primarily business in character, it is by no means inevitable that a significant part of the residential population of the state will benefit.

[56] *See* U.S. CENSUS BUREAU, *supra* note 25, at 288, 290. To avoid double counting, any expenditure that is funded by revenue provided by such locality's state government is not counted as a local expenditure; such expenditure is instead treated as a state expenditure.

= CSC($2912)—($1366). Finally, an average Tennessee income producer realizes a net cost saving of CSI($1659 + $1310)—($316 + $447) = CSI($2969)—($763) and an average Tennessee consumer realizes a net cost saving of CSC($1659 + $1310)—($1301 + $477) = CSC($2969)—($1778).

Given the foregoing, an income producer who has equivalent opportunities in Kentucky and Tennessee will prefer earning income in Tennessee, since he will both receive greater cost savings (however much cost saving an extra $158 of government spending will buy) and incur significantly lower tax costs ($598) in Tennessee. On the other hand, a consumer who has equivalent opportunities in those two states will almost surely prefer consuming in Kentucky, since although he will receive somewhat smaller cost savings in Kentucky (however much cost saving an extra $158 of government spending will buy), he will incur significantly lower tax costs there ($410). Meanwhile, an income producer who has equivalent opportunities in Georgia and Tennessee will prefer earning income in Tennessee, since he will both receive greater cost savings (however much cost saving an extra $57 of government spending will buy) and incur significantly lower tax costs ($709) in Tennessee. However, a consumer who has equivalent opportunities in those two states will almost surely prefer consuming in Georgia, since although he will receive somewhat smaller cost savings in Georgia (however much cost saving an extra $57 of government spending will buy), he will incur significantly lower tax costs in that state ($412). Thus, the presence of local government taxation and spending will not produce stability for Tennessee's fiscal system.

E. Efficiency of State Expenditures

Purely for illustrative purposes, I posited a state benefits technology complete with diminishing marginal returns in Table 1, and then amended it to incorporate a somewhat more efficient local benefits technology in Table 2. Neither of these technologies was intended to bear any particular relationship to reality; it is a probably unanswerable, empirical question as to exactly how much benefit any or even a typical income producer

or consumer derives from state or local government expenditures.

Indeed, at one extreme, it is theoretically possible, albeit highly improbable, that income producers and consumers derive no (or even negative) benefit from state and local government spending. To wit, anti-tax crusaders and other anti-government types frequently oppose all taxation and hence a fortiori all government spending (at whatever level of government) by making the argument that only the people themselves know what they really want. If so, then the people should be allowed to spend their own money, rather than having it taxed away by politicians who will invariably spend it less wisely. Implicit (or perhaps even explicit) in this argument is the notion that at least for the typical income producer and consumer, the state's spending of the marginal $1 of income or sales tax revenue, as the case may be, will generate less than $1 of beneficial cost savings.

While an excess of cost over benefit may in fact exist at a given state's margin[57]—another probably unanswerable empirical question—it is highly unlikely that cost will exceed benefit in such state at every possible level of taxation and spending. This is because much state spending is devoted to public goods that would be underprovided, or not provided at all, if not for state government. Indeed, at the extreme, a society without taxes and spending of any kind is a society without government: a society in the state of nature. Perhaps Marsha Blackburn and Phil Valentine are sufficiently strong and clever that they would prefer to live in the state of nature; I however must sadly confess that I am not.[58] My bedrock working assumption, therefore, is that some level of state taxation is absolutely indispensable in order for income producers and consumers to maximize their utilities. If this is not true, and if any and all state spending is counterproductive, then a potential migrant's optimal decision would be trivially easy: migrate to

[57] I allowed for this possibility in Tables 1 and 2.

[58] *Cf.* Walker, *supra* note 1.

whichever state offers the lowest level of taxation.[59]

Once the state of nature is rejected as a serious policy choice, and the existence of some level of beneficial state taxation and spending is conceded, the analysis becomes more interesting but also more complicated. The difficulty is that the optimal level of state taxation and spending may be different in different states. One reason for such differences is that a state like California, with a high population, might benefit from economies of scale in the provision of benefits; if so, it should be able to deliver more benefits per $1 of tax revenue than could a state like Wyoming with a low population. Another reason is that topography may be relevant to spending efficiency: providing good roads may be cheaper in a flat state like Kansas than in a mountainous state like Colorado. And other factors—location, climate, population density, natural resources, the presence of complementary businesses, etc. may come into play as well.

One way to illustrate the dramatic, but also perhaps somewhat surprising, effects of disparate state benefits technologies is to work through a simple hypothetical. Thus, consider a head-to-head comparison of two states, State A and State B. For simplicity, each state has only two residents, one income producer and one consumer. Hence the global population consists of IncA, IncB, ConsA, and ConsB. Suppose that each state wants to provide $1 of benefit to each income producer and each consumer, but that in order to do this, State A must spend $1 for each income producer and each consumer, while State B must only spend $0.50 for each income producer

[59] Technically, the absence of state (and local) government would not result in the state of nature, since the federal government would presumably remain in place. But just as taxation and spending by a state is primarily a backstop to inadequate levels of local taxation and spending, so is taxation and spending by the federal government primarily a backstop to inadequate state taxation and spending. (For example, without such backstop, there would likely be inadequate spending on national defense, and what spending there was would likely be uncoordinated and duplicative.) A backstop, however, is not a substitute. A state that is protected from foreign attack, but that has no roads and schools and police force, would not be a particularly hospitable place for most income producers and consumers. Indeed, it would be a state not worth the expense or the trouble to protect from foreign attack.

and each consumer. In other words, State B's benefits technology is twice as efficient as State A's.

Suppose that State A decides to impose both an income tax and a sales tax: it collects $1 of income tax from each income producer and $1 of sales tax from each consumer. State B, on the other hand, decides to give income producers a pass; it funds all of its benefits by simply imposing $1 of sales tax on its consumer. The net effect of these strategies is that neither consumer has any incentive to relocate. Each consumer, whether residing in State A or State B, pays $1 of tax and receives $1 of benefit. Thus, while ConsB may have some cause to complain of "unfairness," he has no recourse in the face of such unfairness.

However, note that income producers may have a reason to migrate. IncA pays $1 of tax and receives $1 of benefit, which is not in itself unfair, but he notices that IncB pays no income tax and yet receives the same $1 of benefit. This fact may motivate IncA to relocate to State B. Suppose he does so. Now State B has three residents, including two income producers. If it continues to eschew an income tax, it must increase the amount of sales tax it collects from ConsB. To wit, ConsB must pay $1.50 of sales tax, as this will fund the requisite $3 of benefits. Now ConsB pays $1.50 of tax but receives only $1 of benefit, while his counterpart in State A, ConsA, pays $1 of tax and receives $1 of benefit. ConsB may thus be motivated to relocate to State A.

Where does it all end? Both consumers will reside in State A, paying $1 of sales tax and receiving $1 of benefit, and both income producers will reside in State B, paying no income tax and receiving no benefit! Thus, even though the states have different benefits technologies, in equilibrium, symmetry is restored between the amount of taxes each individual pays and the amount of spending that is conducted on his behalf! Alas, this is not a general result: one can imagine technologies where asymmetries could persist in equilibrium. On the other hand, symmetry will always be an available equilibrium. And it will always be an available equilibrium that has much to recommend it: it will be the only equilibrium that is devoid of surreptitious

transfers either from income producers to consumers, or from consumers to income producers; it will be the only equilibrium that is truly "fair."

Moreover, while an asymmetric equilibrium in the case of two states can readily be concocted, there is reason to believe that such equilibrium is unlikely. This is because a given state is not in competition with only one other state, but with forty-nine other states, and some of those states are likely to have very similar attributes and hence very similar benefits technologies to its own. And it turns out that when technologies are similar, an asymmetric equilibrium will not result.

For example, one can view the dilemma of a state like Tennessee as follows. First, Tennessee generally need not concern itself too much with whether its benefits technology is better or worse than that of Alaska or California; the attributes of Tennessee, Alaska, and California are sufficiently different that migration decisions between such states are unlikely to be greatly affected by state taxation and spending policy.[60] However, Tennessee should concern itself with whether its benefits technology is better or worse than that of Kentucky or Georgia; the attributes of Tennessee, Kentucky, and Georgia are sufficiently similar that migration decisions between such states may well be affected by state taxation and spending policy. But

[60] More generally, not all relevant differences in locations result from state or local government spending and taxation. Aspen's breathtaking views, San Diego's temperate sun, Alaska's crude oil reserves, Boston's universities, and New York's concentration of financial intermediaries are not the result of state and local government spending and taxation. Yet any of these features, and many others too, may be as or more important to many income producers or consumers when they are faced with the decision on where to locate. (I have not yet met a professor who turned down an appointment at Harvard because he disliked Massachusetts' tax and spend policies!) Since all such features benefit or burden only persons working and/or living in the given location, the benefits and burdens should generally be fully reflected in a combination of income (i.e., salary) differentials and cost of living (i.e., property value and rent) differentials. *Cf.* Michael S. Knoll & Thomas D. Griffith, *Taxing Sunny Days: Adjusting Taxes for Regional Living Costs and Amenities*, 116 HARV. L. REV. 987, 1008-12 (2003). The phenomenon of capitalization will be addressed below. The bottom line is that while such features may be a cause of migration, they will ultimately be fully reflected in prices (i.e., there will be an equilibrium, and it will be stable), and thus the presence or absence of such features will not lead to financial instability for state governments in the same way that a faulty tax and spend policy will.

of course it is precisely because the attributes of Tennessee, Kentucky, and Georgia are similar that there is no reason to suppose that their state benefits technologies will be very different. Thus, with respect to such states, equilibrium will likely only result when each state adopts a symmetric taxation and spending policy.

F. Capitalization

The analysis so far has assumed that state taxes and expenditures are not capitalized into asset prices, and that individuals are accordingly able to avoid the cost of state tax policy and capture the benefit of state spending through the simple expedient of migration. But this assumption may be false.

To illustrate, consider an income producer IncA residing in State A, whose business assets in a world without state taxes and benefits would generate net cash flow in perpetuity of $90 per year. These assets, in a world with 10% interest rates, have a fair market value of $900. Now suppose that State A imposes $4 of income tax and lavishes $4 of spending upon IncA. In conformity with Table 1, assume the spending allows IncA to enjoy annual cost savings of $14. Thus, IncA's business assets now generate—at least so long as State A's tax and spending policy remains unchanged—net cash flow of $100 per year. Assuming full capitalization of taxes and benefits (as well as no change to the 10% interest rate), such assets now have a fair market value of $1,000.

Living next door in State B is another income producer, IncB, whose business assets in a world without state taxes and benefits would generate net cash flow in perpetuity of $85 per year. These assets, in a world with 10% interest rates, have a fair market value of $850. Now suppose that State B, in the spirit of Tennessee, imposes no income tax upon IncB, but nevertheless somehow manages to lavish $5 of spending upon him. In conformity with Table 1, assume the spending allows IncB to enjoy annual cost savings of $15. Thus, IncB's business assets now generate—at least so long as State B's tax and spending policy remains unchanged—net cash flow of $100 per

year. Assuming full capitalization of taxes and benefits (as well as no change to the 10% interest rate), such assets now also have a fair market value of $1,000.

One could hardly blame IncA if he covets State B's more pro-income-producer tax and spending policy: in such state he would pay 4 less in income tax and would receive 1 more in cost savings. However, what happens if IncA decides to migrate to State B? Assuming, importantly, that IncA's business assets are not mobile, he must sell them and then use the proceeds to buy alternative business assets in State B. A sale of his assets would generate $1,000 of proceeds; such proceeds would exactly suffice to buy IncB's business assets. However, if he buys IncB's business assets, he would continue to generate exactly $100 per year of cash flow, after taking taxes and spending into account. Because state tax and spending policies are fully reflected in asset prices, migration cannot make IncA better off, notwithstanding State B's preferable policies. Accordingly, there will be no migration, and thus State B's asymmetric tax and spending policy will be stable!

Alas, full or even partial capitalization is exceedingly unlikely. First and foremost, IncA's business assets will include, and indeed may even be limited to, his human capital. This asset is generally extremely mobile: it does not need to be, indeed generally cannot be, sold in State A and repurchased in State B. Without a need to sell and repurchase, IncA can simply transport his business asset (i.e., himself) across state lines: his asset will continue to generate $90 per year before taking taxes and spending into account; he will net an additional $15 per year due to State B's tax and spending policy; thus, migration will make sense. And the same result will obtain for many assets other than human capital: intangible property including intellectual property is generally very mobile; much personal property is very mobile as well. It is only when one is in the realm of real property—factories and warehouses and the like—that capitalization of any type becomes a problem.[61]

[61] Even real business property is somewhat "mobile" in the sense that its supply is not fixed in the long run. The shorter the time frame for bringing new real business property on line, the smaller the degree of capitalization will be even with respect to

What does full capitalization look like in the realm of real property? No rational income producer will assume that a state's tax and spending policy, in particular an unsustainable tax and spending policy, will remain unchanged in perpetuity. Thus, the most that is likely to be capitalized into the fair market value of real business property is the effect of a baseline sustainable tax and spending policy *plus* the effect of at most a few years' worth of asymmetry. Thus, for example, IncB's property might take a fair market value of $960 rather than either $1,000 (assuming full capitalization of State B's asymmetric tax and spending policy) or $950 (assuming full capitalization of only a baseline sustainable symmetric policy a la State A).[62] Note that this property value, in spite of fully capitalizing the best expectations of future tax and spending policy, might nonetheless induce IncA to migrate to State B: it all depends on whether IncA has a different assessment from the market as a whole as to the length of time that State B will maintain its ultimately unsustainable tax and spending policy.[63]

Even in the realm of real property, there will often be only partial capitalization rather than full capitalization. The major reason is that any state tax and spending policy will impact different income producers differently. For example, one income producer may be able to reduce the impact of his state income tax burden by virtue of section 164's deduction, while another

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such property.

[62] This value assumes that State B's policies will be maintained for approximately four years prior to reverting to something sustainable. The calculus performed by a potential buyer with $1,000 to spend, such as IncA, is as follows. If $960 will buy an asset that generates $85 of annual cash flow (ignoring the state's contribution). $1.000 will buy an asset that generates $88.50 of perpetual cash flow (again ignoring the state's contribution). A sustainable state tax and spending policy, a la State A, will add $10 per year of net cash flow, thus guaranteeing that the owner of a $1,000 asset will receive at least $98.50 per year in perpetuity. But due to the asymmetry of State B's tax and spending policy, the owner of the asset will in fact temporarily generate an additional $5 per year of net cash. If such extra net cash is generated for exactly four years, it will properly compensate IncA for the fact that the long-run cash flow of his State B asset is slightly below that of his State A asset.

[63] If the $5 of extra net cash flow referenced in the prior footnote is generated for less than four years, then IncA will, with 20-20 hindsight, have overpaid for the State B asset; if such extra net cash flow is generated for more than four years, IncA will, with 20-20 hindsight, have underpaid for the asset.

may not be able to do so. One income producer may derive a benefit from a particular length of state road, while another may not be able to do so. Thus, what will be capitalized is at most the cost and the benefit obtained by the marginal income producer. And that leaves the door wide open to migration by income producers who are not at the margin.

Finally, it is likely that the degree of capitalization is greater for benefits or taxes tied directly to property, rather than for benefits or taxes not tied directly to property. For example, if the state has furnished a road that gives easy access to a factory, the reduced transportation costs are essentially a feature of the factory. Or if a state has ensured peace and quiet by providing an adequate social safety net, the favorable business environment it fosters is also essentially a feature of business property located in the state. And, of course, if a property tax encumbers a piece of business property, such tax is very directly a feature of the encumbered property. The effects of all of these items are therefore relatively likely to be capitalized into the fair market value of property. However, the effects of an income tax that has a different impact on every income producer and that is not in any sense tied to any one piece of property is relatively unlikely to be capitalized into the fair market value of property.

What result? Looking again at IncA, his property may well increase in value to reflect the $14 per year of cost savings he receives from State A, but is unlikely to decrease in value to reflect the income taxes he pays to State A. Thus, assuming a 10% interest rate, his property is likely to have a fair market value of $1,040. Similarly, IncB's property may well increase in value to reflect the $15 per year of cost savings he receives from State B, and thus might take a fair market value of $1,000. Under these predicates, IncA has every incentive to move: doing so will increase his annual net cash flow by $4. Indeed, under these predicates an income producer's decision-making becomes trivially easy: he always wants to go to whichever jurisdiction imposes upon him the lowest income tax burden. But that desire is precisely what makes the finances of such jurisdiction unstable: there will be inadequate revenue to pay for all of the

benefits demanded by the influx of income producers.

For consumers, the analysis is somewhat different. By definition, every resident consumer owns or leases an immobile real asset: his residence. Thus, a higher degree of capitalization of state taxes and benefits into asset prices or living costs is inevitable. But for similar reasons to those set forth above, capitalization is likely to be partial rather than full.[64] Moreover, for the same reasons set forth above, state benefits and property taxes are much more likely to be capitalized into fair market value than are state sales taxes, since potential sales taxes are much more tenuously tied to a consumer's residence (after all, they can be avoided and/or indefinitely deferred by the expedient of simply not consuming). Thus, in spite of some degree of capitalization, and as was the case with income producers, savvy consumers are likely to short-circuit a more nuanced calculus and migrate to those jurisdictions that offer them the lowest sales tax burden. That migration is precisely what may make the finances of such jurisdictions unstable: there will be inadequate revenue to pay for all of the benefits demanded by the influx of consumers.

G. Active Income Producers and Passive Investors

The discussion so far has lumped all income producers into a single category. They have been deemed to pay (or not pay) state income taxes based upon their income and their home state's income tax policy; and they have been deemed to receive benefits (cost savings) from their home state based on such state's expenditures for the benefit of income producers. There is nothing objectionable to this in the case of income producers who actively produce income in a state, be they individuals who earn income from their labor in the state or businesses that earn income from their capital deployed in the state.

However, the description generally fails to accurately describe income producers who are resident in a state to the

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[64] *Cf.* Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes Under the Federal Income Tax Law*, 82 VA. L. REV. 413, 447 (1996) (noting that "perfect capitalization" rarely describes reality).

extent that they earn passive income: interest, dividends, rents, capital gains, and so on. Such residents directly or indirectly own capital that with significant likelihood is not deployed in their state of residence (after all, they may invest in any one of the remaining forty-nine states, or anywhere else in the world). To the extent that such residents earn passive income that is taxed in their home state but that is derived from capital located elsewhere, it will be next to impossible for their home state to engage in expenditures that facilitate or in any way benefit their production of income. Rather, it is only the state in which their capital is actually deployed that will be able to provide appropriate benefits.

The appropriate state response to this fact should be obvious; the model I introduced above can be easily generalized. Taxpayers actually need to be divided into three groups rather than just two: to (active) income producers and consumers must be added (passive) investors. Following such division and applying precisely the same methodology as above, fiscal stability (and fairness) requires every state to impose taxes on each of these three groups in an amount that is proportional to its expenditure on benefits for such group. Since it is next to impossible for a state to spend any significant amount of money that will benefit passive investors in their capacity as such, it follows that a state should generally not impose any tax at all on passive investors. Thus, a state like Tennessee, which does not impose an income tax on active wage income, but does impose an income tax on passive interest and dividend income, has got its income tax policy exactly backwards!

To be clear, I am not suggesting that passive investors should receive a pass on taxation. But they generally don't. A passive investor owns capital that is actively deployed somewhere. It is to that somewhere that the passive investor should and generally does (directly or indirectly) pay a tax that reflects the benefits he receives from that somewhere. For example, if the passive investor owns corporate stock, his direct and indirect tax bill could and probably should be limited to a corporate income tax imposed directly upon the corporation. And if the passive investor owns a debt instrument, his direct

and indirect tax bill should probably consist solely of a withholding tax upon the interest he receives, where the proceeds of such withholding tax are appropriately divided among the states in which the borrower conducts its business. Finally, if the passive investor owns rental property, his direct and indirect tax bill could (and indeed usually does) take the form of an income tax imposed upon him by the state in which the rental property is located.

H. Does the Presence of an Individual Income Tax Lead to Higher Overall Levels of Taxation?

One reason that activists in a state (like Tennessee) that lacks an individual income tax (or, in the case of Tennessee, a broad-based individual income tax) generally oppose the imposition of such a tax is a fear that the very existence of such a tax, even at an arbitrarily low rate, will inevitably lead to higher overall levels of taxation in the state. The story is a simple one. Politicians love to spend taxpayer money.[65] Thus, they constantly try to increase the level of state spending. But in the long run, they can only succeed if they can find additional revenue. Alas, state revenue comes from a limited number of sources, and these can only be tapped so often. Thus, there is some constraint on spending growth. But if a state that has not heretofore enacted an income tax enacts an income tax, it will have an additional source of revenue.[66] This means that there will be less of a constraint on spending growth. Ergo, there will be more spending. And more spending generally means higher overall levels of taxation.

As already noted, there is much reason to believe that

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[65] Of course, the reason they love to spend taxpayer money is that taxpayers love it when they do. Moreover, this love is rational so long as the spending on balance is efficient. The activists assume that the spending is not efficient. They further assume that the taxpayers who support it are duped: the taxpayers only see the benefits but never think about the costs.

[66] Of course, every state has an income tax as a *potential* source of revenue. In a state without a current income tax, it is quite difficult to tap this source since tapping it requires actually enacting an income tax. In a state that already has an income tax, it is relatively easy to tap this source since tapping it merely requires raising tax rates.

higher overall levels of state spending, and concomitant higher overall levels of taxation, are a good thing since spending in most states is probably suboptimally low.[67] Nonetheless, the emotional appeal of the an-income-tax-will-lead-to-bigger-government argument should not be underestimated since it will always be possible to find, in any state's budget, some truly shameless examples of wasteful pork.

But is the argument even true? Do states that impose an income tax really have a higher level of overall per capita taxation than states that do not impose an income tax? Of the seven states that did not impose any individual income tax whatsoever in 2004, per capita taxes were lower than average in three states, essentially average in two states, and above average in the remaining two states.[68] For the same states, taxes collected as a percentage of income were lower than average in three of them, essentially average in three more, and above average in only one state.

Taxes in States Without an Individual Income Tax

	Per Capita Taxes	Taxes as a Percentage of Income
Alaska	$ 2,035	5.99%
Florida	$ 1,756	5.58%
Nevada	$ 2,031	6.01%
South Dakota	$ 1,378	4.56%
Texas	$ 1,368	4.45%
Washington	$ 2,239	6.39%
Wyoming	$ 2,974	8.68%
U.S. Average	$ 2,026	6.13%

It is interesting to compare the seven states without any individual income tax to the five states without any general retail sales tax. Of these five states, per capita taxes were lower than average in three states, essentially average in one state,

[67] *See* Wilson, *supra* note 51.

[68] This list does not include Tennessee since Tennessee does impose an income tax, albeit one limited to interest and dividend income.

and above average in the remaining state. For the same states, taxes collected as a percentage of income were lower than average in two states, essentially average in two more, and above average in only one.

Taxes in States without a General Retail Sales Tax

	Per Capita Taxes	Taxes as a Percentage of Income
Alaska	$ 2,035	5.99%
Delaware	$ 2,862	8.01%
Montana	$ 1,754	6.34%
New Hampshire	$ 1,544	4.22%
Oregon	$ 1,700	5.56%
U.S. Average	$ 2,026	6.13%

What do these results demonstrate? Very little, I think. Nonetheless, they certainly belie a powerful link between the existence of an individual income tax and a high overall tax burden. Moreover, any such link is no stronger than the link between the existence of a general retail sales tax and a high overall tax burden.

More significantly, it seems clear that most states that opt to impose only one of the two classic types of taxes have found a viable alternative—albeit still a tax—to such taxes. For example, Alaska, which imposes neither an individual income tax nor a general retail sales tax derives most of its tax revenue from income and severance taxes imposed on corporations (primarily oil companies). Texas and Wyoming also derive significant revenues from severance taxes. Nevada follows a different tack, deriving significant revenue from selective sales taxes that primarily impact gamblers and tourists. Delaware derives significant revenue from corporate licensing fees. And Washington is one of the few states to derive significant revenue from a state property tax (timberland). Therefore, I would argue that it is not so much that states keep taxes low by eschewing the imposition of an individual income tax, a retail sales tax, or both but that some states have found an alternative

constituency generally largely concentrated outside the state upon which to foist a portion of their tax burden. These states are thus able to persuade local residents—through their eschewing of one type of tax or the other—that they are philosophically opposed to high levels of taxation, even though they manifestly are not.

None of which is to say that people should not flock to states that have found a way to finance themselves that does not rely on taxing local residents. From the perspective of a prospective income producer or a prospective consumer, the ability of a state to finance benefits by taxing outsiders is free money, and thus a definite plus. But for states that have no such viable outside sources—including prominently my home state of Tennessee—it is fruitless to try to emulate such lucky states.

IV. SOME EMPIRICAL SUPPORT

Several empirical studies have examined some of the claims made in this paper.[69] Unfortunately, they all focus solely on location choices and/or migration of retirees, thus excluding much of the relevant population. Nonetheless, their conclusions are uniformly consistent with what one would expect, given my arguments.

Duncombe, Robbins, and Wolf find that retirees are attracted by locations with "comparatively high public sector spending on public safety and recreational services."[70] In other words, they recognize state and local government spending that directly benefits them and act as one would expect in light of such information. Moreover, retirees "avoid [locations with relatively high] inheritance, property and sales taxes."[71] Since all retirees are consumers, this is hardly a surprise. Finally,

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[69] William Duncombe, Mark Robbins & Douglas Wolf, *Retire to Where? A Discrete Choice Model of Residential Location*, 7 INT. J. POPUL. GEOGR. 281, 281-93 (2001); Karen Conway & Andrew Houtenville, *Do the elderly "vote with their feet?"*, 97 PUBLIC CHOICE 663, 663-85 (1998); Richard Cebula, *A Brief Empirical Note on the Tiebout Hypothesis and State Income Tax Policies*, 67 PUBLIC CHOICE 87, 87-89 (1990).

[70] Duncombe, *supra* note 69, at 290.

[71] *Id.*

"whites, but not non-whites, are also repelled by income taxes."[72] At first blush, this seems harder to explain. However, if it is the case that white retirees as a rule have more retirement savings than non-whites,[73] the explanation is obvious. A retiree with savings is a passive income producer, and so will avoid any state that taxes his (necessarily passive) income, since such state will find it impossible to provide him with corresponding benefits. On the other hand, a retiree without savings and hence without taxable income, should prefer a state that imposes a tax on (passive) income because such state will have an additional revenue source that from his vantage looks exactly like a federal receipt or a tax imposed on persons outside of the state: it is a revenue source that is potentially available to provide the proverbial free lunch.

Conway and Houtenville find that "states with high tax shares (reflecting low federal aid or chronic surpluses, and a higher price for public services) experience greater out-migration."[74] In other words, retirees prefer states with benefits that are paid for by persons other than themselves. They also find that relatively high income taxes lead to out-migration, but to them more surprisingly that "heavy reliance of personal income taxes *increases* in-migration."[75] I do not find this surprising at all. As just noted, income taxes on retirees are necessarily imposed on passive income, and thus are accompanied by no corresponding state benefits. As a result, one would expect retirees who own assets that generate passive income to migrate to states with relatively low income taxes, and one would expect retirees who do not own a significant amount of such assets to migrate to states with relatively high income taxes and a concomitant opportunity for a free lunch.

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[72] *Id.*

[73] The average net worth of non-Hispanic white households in 2000 was $198,184 while that of Hispanic households was $51,908 and that of black households was $35,284. Hous. and Household Econ. Statistics Div., U.S. Census Bureau, Table 5: Asset Ownership of Households 2000 (2005) *available at* http://www.census.gov/hhes/www/wealth/1998_2000/wlth00-5.html (last visited Feb 23, 2009). It is plausible that similar numbers would obtain for retirees.

[74] Conway & Houtenville, *supra* note 69, at 678.

[75] *Id.* at 678-79.

Finally, Cebula, in a much narrower study that focused not on relative income tax rates but simply on the presence or absence of a state income tax, found that "elderly consumer-voters express a strong preference for states without personal income taxes."[76] His study looked solely at in-migration, and is therefore completely consistent with Conway and Houtenville. The story once again is that retirees who own assets that generate passive income will try to relocate to states in which they are not taxed for the provision of benefits they cannot and do not receive.

V. CONCLUSION

Most states—including my home state of Tennessee—have only one viable stable tax and spending policy. Whether the state desires to provide lots of benefits to its residents or only a few, it is of paramount importance that it properly charges the costs of such benefits to the constituencies to which the benefits are provided. Thus, to the extent that a state provides benefits to income producers, it must impose an income (or equivalent) tax on such income producers to pay for their benefits. And to the extent that it provides benefits to consumers, it must likewise impose a sales (or equivalent) tax on consumers. Since every state provides at least some benefits to both income producers and to consumers, it follows that every state must, so long as it desires fiscal stability, impose both an income tax and a retail sales (or equivalent consumption) tax.

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[76] Cebula, *supra* note 69, at 89.

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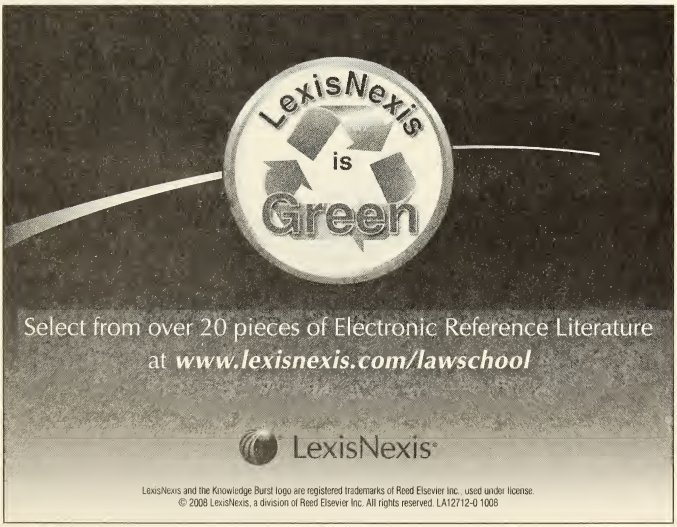
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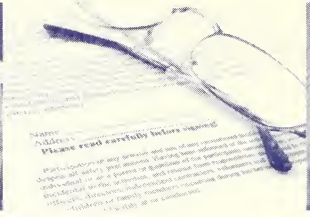

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